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No. 12850

United States
Court of Appeals
for the Ninth Circuit.

JOSEPH G. WHITE,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bank-
ruptcy of the Estate of AL HERD, Bankrupt,

Appellee.

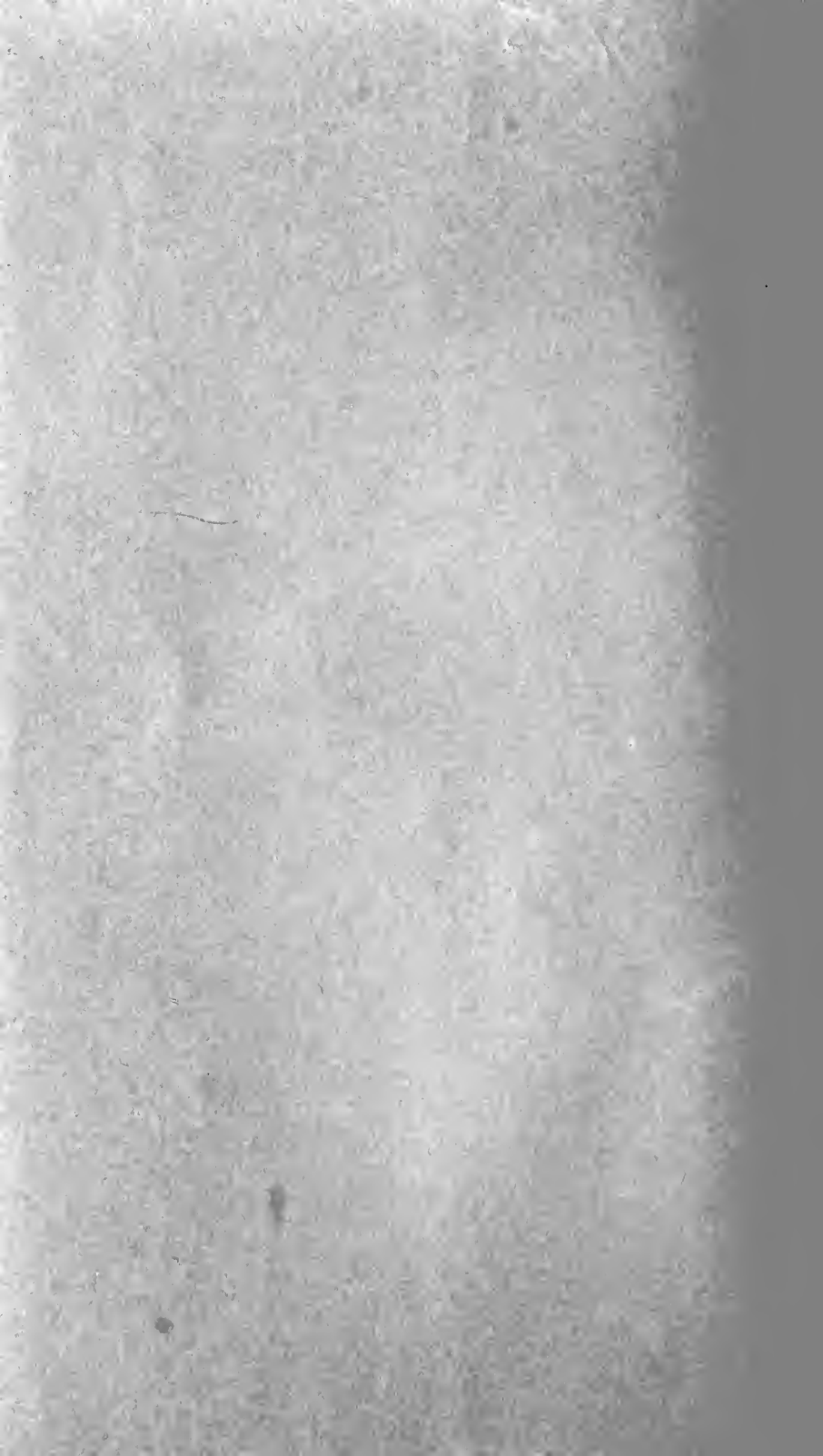
Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

FILED
APR 10 1951

PAUL F. O'BRIEN,

CLERK



No. 12850

United States
Court of Appeals
for the Ninth Circuit.

JOSEPH G. WHITE,

Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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ALVIN F. HOWARD,

325 West Eighth St.,

Los Angeles 14, Calif.

For Appellee:

MARVIN WELLINS,

DANIEL A. WEBER,

325 West Eighth Street,

Los Angeles 14, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. 45176 BH

In the Matter of

The Estate of AL HERD,

Bankrupt.

PETITION TO QUIET TITLE TO FUNDS IN
THE POSSESSION OF THE TRUSTEE

To the Honorable Benno M. Brink, Referee in
Bankruptcy, United States District Court,
Southern District of California, Central Division:

The petition of Francis F. Quittner respectfully
shows:

I.

That he is the duly appointed, qualified and acting
Trustee in Bankruptcy herein.

II.

That on or about March 3, 1949, the Referee
entered an order approving the First Report and
Account of the Trustee herein.

III.

That the Trustee has on hand a sum slightly in
excess of \$7,000.00 which is available for immediate
distribution to preferred creditors herein.

IV.

That petitioner has been notified by Mr. Fred Horowitz, attorney for one Joseph G. White, that he asserts a claim in and to the sum of \$6,220.00 paid to petitioner upon a judgment recovered in an action entitled "George L. Gibbons vs. Joseph G. White," in the Superior Court of Los Angeles County, case No. 533,306, which judgment was entered August 25, 1948, in the amount of \$6,035.75.

V.

That petitioner desires to quiet title in and to the aforesaid proceeds in his possession in order that he may effect immediate distribution thereof to the preferred creditors entitled thereto.

Wherefore, petitioner prays that an Order to Show Cause issue herein, requiring said Joseph G. White, or his representatives, to show cause, if any he have, before the Referee herein, on September 6, 1949, at 10 a.m., why an order should not be entered herein quieting title in and to the proceeds in the possession of the petitioner herein; and requiring said Joseph G. White to serve and file his Answer to this petition, setting forth his claim, if any, in and to said funds or proceeds, on or before August 26, 1949.

Dated August ..., 1949.

/s/ FRANCIS F. QUITTNER,
Petitioner.

State of California,
County of Los Angeles—ss.

Francis F. Quittner being by me first duly sworn, deposes and says: that he is the Petitioner in the above-entitled proceeding; that he has read the foregoing Petition to Quiet Title to Funds in the Possession of the Trustee and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ FRANCIS F. QUITTNER.

Subscribed and sworn to before me this 19th day of August, 1949.

[Seal] /s/ G. ABRAMSON,
Notary Public in and for Said County and State of
California.

[Endorsed]: Filed August 20, 1949.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE TO QUIET TITLE
TO FUNDS IN POSSESSION OF TRUSTEE

Upon the annexed verified petition of the Trustee in Bankruptcy herein, and sufficient cause appearing therefor,

It Is Hereby Ordered that Joseph G. White show cause, if any he have, before the undersigned

Referee in Bankruptcy, at his court room, Federal Building, Los Angeles, California, on the 6th day of September, 1949, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein quieting the title of the Trustee in Bankruptcy herein in and to the funds and proceeds in his possession.

It Is Further Ordered that said Joseph G. White shall, on or before the 26th day of August, 1949, serve upon the attorneys for the Trustee and file his Answer to this petition, setting forth his claim, if any, in or to said funds or proceeds in the possession of the Trustee herein.

It Is Further Ordered that service of a copy of this Order to Show Cause and the annexed Petition by mail upon said Joseph G. White on or before the 20th day of August, 1949, or delivery thereof in person to the office of Mr. Fred Horowitz, attorney for said Joseph G. White, on or before said date, shall be deemed good and sufficient service and notice thereof.

Dated at Los Angeles, California, this 20th day of August, 1949.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed March 20, 1949.

[Title of District Court and Cause.]

AMENDED ANSWER TO ORDER
TO SHOW CAUSE

Respondent, Joseph G. White, having obtained leave of court to file this, his Amended Answer to Order to Show Cause setting forth his claim to funds or proceeds in the possession of the Trustee herein, respectfully shows:

I.

For a considerable period of time prior to this bankruptcy proceeding, the bankrupt was borrowing money from one George Gibbons.

II.

On or about May 1, 1947, George Gibbons commenced legal action and attached the bankrupt on account of money loaned. On or about May 19, 1947, Respondent, Joseph G. White, as a gratuitous accommodation to the bankrupt, gave George Gibbons his promissory note in the sum of \$5000.00 in consideration of which the aforesaid attachment was released.

III.

On August 12, 1947, George L. Gibbons commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled, "George L. Gibbons vs. Joseph G. White, et al," No. 533306. Said action was to collect the aforesaid promissory note in the principal sum of \$5000.00, plus interest and attorney fees. An an-

swer was filed on behalf of Joseph G. White and the case was set for trial on August 26, 1948. George L. Gibbons was therein represented by the law firm of Jones and Wiener.

IV.

On or about December 24, 1947, the Trustee herein commenced an action in the United States District Court against the aforesaid Gibbons, claiming that Gibbons had charged the bankrupt usurious rates of interest and that Gibbons secured an unlawful preference when he received the said White note in the sum of \$5000.00. In connection with said action, the Trustee caused White to be served with a garnishment, specifically referring to the sum due from White to Gibbons under the aforesaid accommodation note in the sum of \$5000.00. During the month of June, 1948, the Trustee herein, acting through his attorneys, Marvin Wellins and Daniel A. Weber, compromised and settled his aforesaid action against Gibbons. In said settlement, among other things, it was agreed by and between Gibbons and the Trustee that the said note in the sum of \$5000.00 would be the property of the Trustee and that the Trustee would prosecute for his own benefit the said action against White commenced by Gibbons. At the time of making said settlement with Gibbons, the Trustee's attorneys were aware that if White knew that the Trustee had become the real party in interest in the said action originally commenced by Gibbons against White, that White would be able to assert offsets

and defenses which were available to him against the Trustee but not against Gibbons. The particulars concerning said offsets and defenses are set forth in the following paragraph. The attorneys for the Trustee thereupon adopted a scheme to conceal from White and from the Superior Court of the State of California the fact that the Trustee had become the owner of said note and had become the real party in interest in said action so as to prevent White from having an opportunity to assert his claims.

V.

The aforesaid note of White to Gibbons in the sum of \$5000.00 was executed by White as an accommodation for Herd, and White received no consideration for its execution. In addition to the execution of said note, White also executed a note in favor of Morris Plan Bank of California in the sum of \$25,000.00, without consideration, as an accommodation for the bankrupt. As evidence of his obligation to White under the aforesaid two accommodation notes, the bankrupt gave White his note in the sum of \$30,000.00. No part of said \$30,000.00 has been paid to White.

VI.

On July 13, 1948, Daniel A. Weber and Marvin Wellins, as attorneys and agents for the Trustee herein, but representing themselves as the attorney for George L. Gibbons, caused a motion for summary judgment to be served and filed in said Superior Court action.

VII.

In support of said motion for summary judgment said attorneys, acting for and on behalf of said Trustee, caused an affidavit of George L. Gibbons to be filed wherein it was stated that the motion was his motion and that Marvin Wellins and Daniel A. Weber were his present attorneys, although said attorneys well knew that the motion was not his but that of the Trustee herein, and that they were not his attorneys but were, in truth, representing the Trustee.

VIII.

The aforesaid affidavit and representation made to White and to the Superior Court of the State of California that Gibbons was the real party in interest in the Gibbons action at the time said motion for summary judgment was heard, were made for the purpose of denying to respondent Joseph G. White the opportunity of urging the defense that the note sued upon was an accommodation note and that there was an offset on account of the said \$30,000.00 note executed by Herd in favor of White, which defense and offset, as the attorneys for the Trustee then knew, were not available to White in an action prosecuted by Gibbons but were available to White in an action prosecuted by the Trustee, all as set forth in the "petition for allowance to attorneys for Trustee" at page 21 as follows:

"Preferring not to bring about a change in parties in the Gibbons suit against White by substitution of the Trustee as plaintiff (with

consequent danger of affording White an opportunity to offset claims assertable against the Trustee but not against Gibbons), petitioners elected to continue the action in the name of Gibbons and to have the Trustee take an assignment of the entire proceeds which may be recovered in said action.”

IX.

In reliance on the aforesaid false affidavit and misrepresentation of said attorneys, judgment was awarded by the Superior Court to George L. Gibbons in said action in the sum of \$5000.00, plus interest in the sum of \$500.00, plus attorney's fees in the sum of \$500.00, plus costs; and Joseph G. White paid the sum of \$6220.00 in satisfaction of said judgment.

X.

Said sum of \$6220.00 was paid to Marvin Wellins, who acknowledged receipt thereof as attorney for the Trustee herein and as attorney for George L. Gibbons, knowing that he did not represent George L. Gibbons but represented said Trustee only. Marvin Wellins, as agent for said Trustee, at said time represented to White that he would, and he did, acknowledge receipt as attorney for said Trustee so as to relieve Joseph G. White of any liability to the Trustee under the aforesaid garnishment referred to in paragraph IV hereof, for the purpose of leading said White to believe that he

represented Gibbons in said transaction, although this was not true.

Wherefore, respondent Joseph G. White prays that said Trustee pay over to said respondent said sum of \$6220.00.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,
Attorneys for Joseph G.
White.

State of California,
County of Los Angeles—ss.

Joseph G. White, being by me first duly sworn, deposes and says: that he is the respondent in the above-entitled action; that he has read the foregoing Amended Answer to Order to Show Cause and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOSEPH G. WHITE.

Subscribed and sworn to before me this 16th day of December, 1949.

[Seal] /s/ MARGARET L. DAVIS,
Notary Public in and for the County of Los Angeles, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 19, 1949.

[Title of District Court and Cause.]

TRUSTEE'S REPLY TO AMENDED ANSWER
OF RESPONDENT WHITE IN PROCEED-
INGS TO QUIET TITLE

Comes Now the trustee in bankruptcy herein and for his reply to the amended answer of respondent Joseph G. White in proceedings to quiet title, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I.

II.

Admits that on or about May 1, 1947, George L. Gibbons commenced an action against the bankrupt in the Superior Court of Los Angeles County, State of California, for the recovery of moneys loaned; that on or about May 19, 1947, respondent White gave said Gibbons his promissory note in the sum of \$5,000.00; that thereafter an attachment which had previously issued in said action was released; that on or about August 12, 1947, said Gibbons commenced an action against respondent White in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "George L. Gibbons, plaintiff, vs. Joseph G. White, defendants, et al., case No. 533,306 (hereinafter referred to as the "promissory note action"); that said action was brought to collect the aforesaid promissory note in the principal sum of \$5,000.00 given by respondent White to said Gibbons, plus interest and attorney's

fees; that an answer was filed on behalf of respondent White in said action and that the case was thereafter set for trial on August 26, 1948; and that Gibbons was originally represented in said action by the law firm of Jones & Wiener. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraphs II and III.

III.

Admits that on or about December 24, 1947, the trustee herein commenced an action in the United States District Court for the Southern District of California, Central Division, against the said Gibbons, case No. 7870-Y, alleging that the bankrupt had made usurious payments of interest to Gibbons upon certain loans, and that Gibbons had secured an unlawful preference in connection with said promissory note in the sum of \$5,000.00; that in said action the trustee caused to be served upon respondent White on or about the 13th day of April, 1948, a garnishment of the debt owing from the respondent White to Gibbons by reason of said promissory note; and that during the month of June, 1948, the trustee herein, acting through his attorneys, Marvin Welins and Daniel A. Weber, with leave of this Court, and upon an order after hearing on notice to creditors, compromised and settled the trustee's aforesaid action against Gibbons. Except as expressly admitted herein, the trustee denies generally and specifically each and every allegation contained in paragraph IV.

IV.

Admits that respondent White executed a promissory note payable to Morris Plan Bank of California in the sum of \$25,000.00 and that a promissory note in the sum of \$30,000.00 was executed and delivered by the bankrupt to respondent White. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraph V, and expressly denies that the \$5,000.00 note alleged therein was executed by White as an accommodation for Gibbons or Herd, and further expressly denies that White received no consideration for the execution thereof.

V.

Admits that on or about July 13, 1948, Messrs. Marvin Wellins and Daniel A. Weber, acting as attorneys for George L. Gibbons, plaintiff in the promissory note action, caused a motion for summary judgment to be served and filed therein; that in support of said motion for summary judgment said attorneys, acting for and on behalf of the plaintiff in said action, to wit, George L. Gibbons, caused an affidavit of George L. Gibbons to be filed therein stating that said motion for summary judgment was his motion, i.e., plaintiff's motion; and that Messrs. Marvin Wellins and Daniel A. Weber were his attorneys in connection therewith. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraph VII.

VI.

Admits that the petition filed by Messrs. Wellins and Weber in this Court for an allowance to them as attorneys for the trustee in bankruptcy herein contained substantially the quoted portion set forth in paragraph VIII of the amended answer of respondent White. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraph VIII.

VII.

Admits that judgment was awarded by the Superior Court of Los Angeles County to the plaintiff in said action, to wit, George L. Gibbons, in the sum of \$5,000.00, plus interest in the sum of \$500.00, plus attorneys' fees in the sum of \$500.00, plus costs; that Joseph G. White paid the sum of \$6,220.00 in satisfaction of said judgment. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraph IX.

VIII.

Admits that on December 14, 1948, said sum of \$6,220.00 by checks by respondent White in satisfaction of said judgment was delivered to Marvin Wellins, who thereupon acknowledged receipt thereof as one of the attorneys for the trustee herein, and as one of the attorneys for George L. Gibbons as plaintiff in said action. Except as expressly admitted herein, the trustee denies generally and specifically each and every allegation contained in paragraph X.

As and for a First, Separate and Distinct Defense,
the Trustee Alleges:

I.

On or about August 25, 1948, a judgment was entered in the Superior Court of the State of California, County of Los Angeles, in said promissory note action, entitled "Gibbons vs. White," case No. 533,306, which judgment was entered in Book 1954, Page 37 of Judgments, in the office of the County Clerk of the County of Los Angeles. By said judgment it was adjudged that the plaintiff in said action, to wit, George L. Gibbons, recover from the defendant the sum of \$6,035.75.

II.

The defendant in said action, who is the respondent White in this proceeding, appeared in said action, filed an answer to the complaint, and litigated the issues raised therein.

III.

Among the issues necessarily determined in said action were the issues of the plaintiff's (Gibbons) title in and to said promissory note, his right to maintain said action, and his right to recover judgment upon said promissory note.

IV.

By said judgment said issues were adjudicated and determined in favor of the plaintiff.

V.

No appeal has ever been taken from said judgment, and the same became and was at all times until the same was paid, satisfied and discharged by respondent White on December 17, 1948, a final, valid and subsisting judgment.

VI.

By reason of the foregoing, the issues raised and tendered by respondent White in respect to the funds in the possession of the trustee herein, and the matters and transactions alleged in the amended answer, are *res judicata*, and respondent White is concluded thereby; and respondent White is estopped and precluded from relitigating any of said issues or matters, or from asserting any claim, counterclaim or offset in respect thereto, or to said funds, or the cause of action underlying said judgment.

As and for a Second, Separate and Distinct Defense,
the Trustee Further Alleges:

I.

The trustee incorporates herein by reference each and every allegation contained in the First Separate and Distinct Defense herein set forth.

II.

Thereafter and on or about December 17, 1948, respondent White, who was the defendant and judgment-debtor in said promissory note action, paid

the sum of \$6,220.00 in full satisfaction and discharge of said judgment.

III.

By reason thereof, respondent White is estopped and precluded from making any attack upon said judgment, or from asserting any claim, counterclaim or offset in respect thereto, or to said funds, or the cause of action underlying said judgment.

As and for a Third, Separate and Distinct Defense, the Trustee Further Alleges:

I.

The trustee incorporates herein by reference paragraphs I and II of his Second, Separate and Distinct Defense herein set forth.

II.

At the time respondent White paid, satisfied and discharged said judgment as aforesaid, he knew that the proceeds of said judgment inured and belonged to, and had been assigned by Gibbons to the trustee in bankruptcy herein.

III.

By reason of the premises respondent White is estopped and precluded in this proceeding, or in any other proceeding, from recovering the proceeds of said payment from the trustee in bankruptcy herein.

As and for a Fourth Separate and Distinct Defense,
the 'Trustee Further Alleges:

I.

On or about March 16, 1948, the trustee in bankruptcy herein filed an action in the Superior Court of Los Angeles County, State of California, case No. 542,157, against the respondent, who was the defendant in said action, for an accounting by the defendant of all matters and transactions between the bankrupt and the respondent in respect to the bankrupt's business conducted at 7077 Sunset Boulevard, Los Angeles, California. (Said action is hereinafter referred to as the "accounting action.")

II.

Among the issues and transactions involved in said action was the existence or non-existence of a partnership relation between the bankrupt and the respondent, and the nature, extent and character of the payments made by the respondent White, and evidences of indebtedness executed by respondent White to, for or in connection with the bankrupt or the bankrupt's business.

III.

On or about April 12, 1948, the respondent (defendant in said accounting action) filed his answer therein and said action was thereupon fully litigated and final judgment entered therein on May 16, 1949, in favor of the respondent White, adjudging that the plaintiff (trustee) take nothing by his complaint.

IV.

The alleged indebtedness of the bankrupt to respondent White asserted in the respondent's amended answer herein, arose out of the transactions directly involved in said accounting action; and that the claim or counterclaims of respondent White asserted herein arose out of the transactions set forth in the complaint in said accounting action as the foundation of the plaintiff's claim in said action.

V.

At no time in said action did the respondent, either in his pleading or during the trial or at any other time, assert any claim, counterclaim or cross-complaint against the bankrupt or the trustee in bankruptcy herein.

VI.

By reason of the premises, the respondent is estopped and precluded under and by virtue of section 439 of the Code of Civil Procedure of the State of California, from maintaining any proceeding upon, or asserting or claiming any indebtedness, offsets or counterclaims alleged in the respondent's amended answer herein.

As and for a Fifth, Separate and District Defense, the Trustee Further Alleges:

I.

The trustee incorporates herein by reference each and every allegation contained in paragraphs I to V inclusive of the First, Separate and Distinct De-

fense, and paragraph II of the Second, Separate and Distinct Defense set forth herein.

II.

On or about July 15, 1948, Messrs. Wellins and Weber, as attorneys for plaintiff George L. Gibbons, in said promissory note action, filed a motion for summary judgment, which motion was noticed for hearing in Department 35 of said Superior Court on July 26, 1948. Said motion was thereafter continued to August 16, 1948.

III.

Prior to August 16, 1948, respondent White and his attorneys in said promissory note action, knew that any and all proceeds which might be recovered in said action would inure and belong to, and had been assigned by Gibbons, to the trustee in bankruptcy herein.

IV.

On or about August 13, 1948, with knowledge of the foregoing facts, Messrs. Horowitz & Howard, attorneys for the defendant in said proceeding (respondent White), served an amended answer to the complaint in said action wherein they failed to assert or make any defense, offset, counterclaim or cross-complaint in connection with the matters hereinbefore alleged, or any of the matters alleged in the amended answer filed in this proceeding by respondent White.

V.

On or about August 16, 1948, said motion for

summary judgment duly came on for hearing before said Superior Court, and said motion was thereupon argued by Alvin F. Howard, of counsel for defendant White in said action.

VI.

Plaintiff's motion for summary judgment was thereupon granted and judgment was thereafter entered in said action on August 25, 1948, pursuant to the order of said Court granting said motion for summary judgment.

VII.

Pursuant to the request of Messrs. Horowitz & Howard, attorneys for the defendant in said action, said Superior Court granted a twenty-day stay of execution upon said judgment.

VIII.

At no time prior to the payment and satisfaction of said judgment as aforesaid did the defendant in said action, or his attorneys, assert any claim, counterclaim, defense or offset, or initiate any motion, proceeding or action in connection with the matters hereinbefore alleged, or the matters alleged in the respondent's amended answer in this proceeding.

IX.

By reason of the premises, the respondent is precluded and estopped from asserting all or any of the matters alleged in his amended answer herein.

As and for a Sixth, Separate and Distinct Defense,
the Trustee Further Alleges:

I.

On or about May 3, 1948, the trustee filed a verified petition with the Referee in Bankruptcy herein for leave to compromise the aforesaid suit therefore brought by the trustee against Gibbons in the United States District Court, Southern District of California, Central Division, case No. 7870-Y. In said petition to compromise, the trustee set forth the terms of the proposed settlement offer made by Gibbons to the trustee, said petition reading in part as follows (page 3, lines 25-32):

“In addition, defendant (meaning Gibbons) agreed to transfer to the above estate all his right, title and interest in and to a certain promissory note dated May 19, 1947, in the sum of Five Thousand Dollars (\$5,000.00), plus interest and attorney’s fees, executed by one Joseph G. White, which note is the subject of a pending action in the Superior Court of Los Angeles County, brought by defendant against said White. The estate, in its discretion, is given the alternative of an assignment of any recovery by defendant in said action.” (Parenthetical words added.)

II.

In addition thereto, the proposed written settlement offer made by Gibbons to the trustee was attached to said petition as Exhibit A thereof, which settlement offer reads in part as follows:

“In addition thereto, I agree to transfer and assign to you (meaning the trustee) all my right, title and interest in and to that certain promissory note heretofore executed by Joseph G. White to me, dated on or about May 19, 1947, in the sum of Five Thousand Dollars (\$5,000.00), plus interest and attorney’s fees; or in the alternative, all my right, title and interest in and to any recovery by me thereunder. You shall have the right to determine whether or not the assignment shall cover the note or the proceeds of any recovery in the action now pending thereon.” (Parenthetical words added.)

III.

Pursuant to the prayer of said petition, a notice of hearing was thereupon sent by the office of the Referee to all listed or known creditors of the bankrupt, which note was dated May 6, 1948. Said notice set forth, among other things, the terms of said offer of settlement, including the substance of the language of the petition to compromise quoted and set forth in paragraph I of this defense. Said hearing was noticed for May 19, 1948.

IV.

On May 19, 1948, said petition to compromise the trustee’s action against Gibbons came on for hearing; and, the petition was thereupon granted without opposition.

V.

On May 25, 1948, an order was entered by the

Referee in Bankruptcy herein confirming said compromise, which order reads in part as follows (Page 2, lines 9 to 18):

“* * * upon the further condition that the said George L. Gibbons shall have executed and delivered to the trustee on or before June 15, 1948, an Assignment of any and all proceeds which may be recovered or which may be entitled to be recovered by the said George L. Gibbons in a certain suit pending in the Superior Court, Los Angeles County, State of California, against one Joseph G. White in connection with a certain promissory note, dated May 19, 1947, in the sum of Five Thousand Dollars (\$5,000.00), plus interest and attorney's fees, said Assignment to be in form approved by 'Trustee.'”

VI.

Pursuant to said order confirming said compromise, Gibbons executed an assignment to the trustee, dated “June . . . , 1948,” of all his right, title and interest in and to any recovery in his then pending action against White upon said promissory note.

VII.

Thereafter, and on or about June 16, 1948, the trustee filed his petition with the referee in bankruptcy herein, for an order authorizing Messrs. Wellins and Weber to substitute themselves in the place and stead of the law firm of Jones & Wiener, as attorneys for the plaintiff, to wit, George L. Gibbons, in the promissory note action aforesaid,

which petition reads in part as follows (Page 2, lines 2 to 8):

“That in view of the fact that this estate is entitled to the proceeds of any recovery in said action, petitioner believes it to be in the best interests of this estate that his attorneys, Marvin Wellins and Daniel A. Weber be substituted as attorneys for the plaintiff, George L. Gibbons, in said pending action against Joseph G. White, in the Superior Court, Los Angeles County, bearing No. 533306.”

VIII.

On or about June 16, 1948, an order was entered by the Referee in Bankruptcy herein authorizing said substitution of attorneys.

IX.

Thereafter, and pursuant to said order authorizing such substitution of attorneys, a copy of the substitution of attorneys, duly executed by Marvin Wellins and Daniel A. Weber, George L. Gibbons, and Jones & Wiener, was served by mail on July 13, 1948, upon Messrs. Cannon & Callister, who were then the attorneys of record for the respondent White in said promissory note action, and the original of said substitution, duly executed as aforesaid, was filed in the office of the County Clerk of Los Angeles County on July 19, 1948.

X.

At all times herein mentioned, respondent White

and his attorneys in said action knew of the pendency of these bankruptcy proceedings and that Messrs. Wellins and Weber, the successor attorneys for the plaintiff in said promissory note action, were also the attorneys for the trustee in bankruptcy herein.

XI.

The respondent and his attorneys were negligent in failing to examine the files and records of the referee in bankruptcy herein, which examination, in the exercise of reasonable diligence, should have been made.

XII.

An examination of the files in the above bankruptcy proceedings in the office of the Referee in Bankruptcy herein would have disclosed fully and completely to respondent White, or his attorneys, or other representatives, the full facts in respect to the trustee's acquisition of an interest in, and the assignment by Gibbons to the trustee of, the recovery, if any, in the promissory note action aforesaid, and all other facts spread upon the records of this court as aforesaid.

XIII.

By reason of the foregoing, the respondent is estopped and precluded from asserting, maintaining or claiming his ignorance of the trustee's interest in the recovery in said promissory note action, and all or any of the matters alleged in his amended answer herein.

As and for a Seventh, Separate and Distinct Defense, the Trustee Further Alleges:

I.

The trustee incorporates herein by reference each and every allegation contained in paragraphs I to IX inclusive of the Sixth, Separate and Distinct Defense.

II.

Under and by virtue of Section 385 of the Code of Civil Procedure of the State of California, the plaintiff in said action, to wit, George L. Gibbons, was the proper party to maintain and continue said action, and to prosecute the same as plaintiff, and was at all times the real party in interest therein.

As and for an Eighth, Separate and Distinct Defense, the Trustee Further Alleges:

I.

At no time has the respondent ever filed a claim against the bankrupt in these bankruptcy proceedings, and that the time for the filing of creditor's claims herein has expired.

II.

By reason thereof, the claims set forth in the respondent's amended answer are not maintainable against the trustee in bankruptcy herein.

As and for a Ninth, Separate and Distinct Defense,
the Trustee Further Alleges:

I.

The trustee incorporates herein by reference each and every allegation contained in paragraphs I to XII inclusive of the Sixth, Separate and Distinct Defense, and paragraph I of the Eighth, Separate and Distinct Defense herein set forth.

II.

By reason of the premises, respondent White is estopped and precluded from asserting or claiming ignorance of the trustee's interest in and to the proceeds of said recovery, or of any of the facts herein set forth, of which he would have had notice if his alleged claim had been filed in the above bankruptcy proceedings; and from charging or imputing to the trustee any breach of duty in allegedly failing to notify the respondent independently of the foregoing matters spread upon the records of this court, and of which all creditors whose claims were duly filed had notice.

As and for a Tenth, Separate and Distinct Defense,
the Trustee Further Alleges:

I.

There is a defect of parties in this proceeding in that the plaintiff and judgment-creditor in said promissory note action, to wit, George L. Gibbons, is not a party to this proceeding, and that he resides outside the jurisdiction of this court, to wit, in the State of Arizona.

As and for an Eleventh, Separate and Distinct Defense, the Trustee Further Alleges:

I.

That the amended answer of the respondent White is insufficient as a matter of law and fails to state a claim upon which relief can be granted.

As and for a Twelfth, Separate and Distinct Defense, the Trustee Further Alleges:

I.

That the Referee in Bankruptcy has no jurisdiction to grant the relief prayed for by the respondent White.

As and for a Thirteenth, Separate and Distinct Defense, the Trustee Further Alleges:

I.

The trustee incorporates herein by reference each and every allegation contained in paragraphs I to VI inclusive of the First Affirmative Defense herein.

II.

That by reason of the premises, respondent White is barred from relief under the provisions of Section 473, C.C.P.

As and for a Fourteenth, Separate and Distinct Defense, The Trustee Further Alleges:

I.

That the trustee incorporates herein by reference each and every allegation contained in each and every paragraph of the First Affirmative Defense

herein, as well as the Fourth Affirmative Defense herein.

II.

That the respondent White has delayed unreasonably in presenting and filing his alleged claim herein, and by reason thereof that the respondent White is barred by laches from asserting the same.

As and for a Fifteenth, Separate and Distinct Defense, the Trustee Further Alleges:

I.

That the respondent White is barred from asserting or recovering on his alleged claim herein by reason of the provisions of Sections 68 and 57g. of the Bankruptcy Act. That the alleged claim of respondent White is not a mutual debt or credit between the estate of the bankrupt herein and the said White. That the alleged claim of the respondent White is not provable against the estate of the bankrupt herein, and that said claim is not allowable against the estate of the bankrupt herein under and by virtue of the aforesaid provisions of the Bankruptcy Act.

Wherefore, the trustee prays that the respondent take nothing under his amended answer, and that the claims asserted by said respondent be dismissed, and that an order be entered herein quieting title in trustee in and to the funds and moneys in his possession in the above estate.

MARVIN WELLINS and
DANIEL A. WEBER,

By /s/ MARVIN WELLINS,
Attorneys for Trustee in
Bankruptcy.

/s/ FRANCIS F. QUITTNER,
Trustee in Bankruptcy.

State of California,
County of Los Angeles—ss.

Francis F. Quittner, being by me first duly sworn, deposes and says: that he is the Trustee in Bankruptcy herein in the above-entitled action; that he has read the foregoing Trustee's Reply to Amended Answer of Respondent White in Proceedings to Quiet Title, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ FRANCIS F. QUITTNER.

Subscribed and sworn to before me this 24th day of January, 1950.

[Seal] /s/ SIDNEY R. TROXELL,
Notary Public in and for Said County and State of
California.

Receipt of Copy Acknowledged.

[Endorsed]: Filed January 25, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW IN PROCEEDINGS TO QUIET
TITLE

The trustee in bankruptcy herein having filed a petition on August 20, 1949, requiring respondent Joseph G. White to show cause why the trustee's title in and to the funds in his possession should not be quieted and requiring said respondent to set forth his claim, if any, in or to said funds; and an order to show cause bearing said date having issued by the undersigned Referee in Bankruptcy directed to said respondent; the respondent having filed an "answer" herein on August 24, 1949, and thereafter an "amended answer" on December 18, 1949, and the trustee having filed a "reply" to said amended answer on January 25, 1950; and the proceeding having duly come on for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy herein, on October 4, 1949, January 27, 1950, and January 31, 1950, Fred Horowitz and Alvin F. Howard having appeared as attorneys for said respondent, and Marvin Wellins and Daniel A. Weber having appeared as attorneys for the trustee in bankruptcy herein; after hearing the allegations and proofs of the parties and being fully advised in the premises, the following findings of fact and conclusions of law, constituting the decision of the Court in said proceeding, are hereby made:

Findings of Fact

I.

For a considerable period of time prior to this bankruptcy proceeding, the bankrupt was borrowing money from one George Gibbons.

II.

On or about May 1, 1947, George Gibbons commenced legal action and attached the bankrupt on account of money loaned. On or about May 19, 1947, Respondent, Joseph G. White, as a gratuitous accommodation to the bankrupt, gave George Gibbons his promissory note in the sum of \$5000.00 in consideration of which the aforesaid attachment was released.

III.

On August 12, 1947, George L. Gibbons commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled: "George L. Gibbons v. Joseph G. White, et al.," No. 533306. Said action was to collect the aforesaid promissory note in the principal sum of \$5000.00, plus interest and attorney fees. An answer was filed on behalf of Joseph G. White and the case was set for trial on August 26, 1948. George L. Gibbons was therein represented by the law firm of Jones and Wiener.

IV.

That on or about December 24, 1947, the Trustee herein commenced an action in the United States District Court for the Southern District of Cali-

fornia, Central Division, case number 7870-Y, against George L. Gibbons, claiming that said Gibbons had charged the bankrupt usurious rates of interest on the loans referred to in Paragraphs I and II hereof, and that Gibbons had procured an unlawful preference when he received the said promissory note dated May 19, 1947, executed by Respondent to Gibbons in the sum of \$5000.00. In said action, the plaintiff therein, to wit, the Trustee in Bankruptcy herein, caused to be issued a garnishment in the amount of \$4,617.38, which garnishment was personally served upon the respondent on April 13, 1948, as a debtor of said Gibbons in said sum of \$5000.00.

V.

During the month of May, 1948, pursuant to an order of the Referee in Bankruptcy herein, dated May 25, 1948, the Trustee herein and George L. Gibbons compromised the claim asserted by the Trustee in the action referred to in Finding No. IV. By said compromise it was agreed, among other things, that Gibbons would assign to the Trustee all of his right, title and interest in the aforesaid \$5000.00 note and in the action thereon. The Trustee, so as to avoid affording respondent an opportunity to assert possible claims which might have been assertable against the Trustee but not against Gibbons, did not disclose to respondent the interest of the Trustee in said \$5000.00 note or in the aforesaid promissory note action. The Trustee herein and his attorneys in doing the things referred to in

this paragraph acted honestly and in good faith and in the diligent pursuit of the best interests of the bankrupt estate and its creditors.

V—A

That the interest of the trustee in bankruptcy herein under and by virtue of said assignment was acquired by the trustee in bankruptcy herein after the filing of the petition in bankruptcy in the above-entitled proceedings; and that the trustee in bankruptcy herein acquired his interest thereunder for a valuable consideration furnished by the trustee.

VI.

That thereafter, and on or about June 16, 1948, the Trustee filed his petition with the Referee in Bankruptcy herein for an order authorizing Messrs. Wellins and Weber to substitute themselves in the place and stead of the law firm of Jones & Wiener, as attorneys for the plaintiff, to wit, George L. Gibbons, in the promissory note action aforesaid, which petition reads in part as follows (page 2, lines 2 to 8):

“That in view of the fact that this estate is entitled to the proceeds of any recovery in said action, petitioner believes it to be in the best interests of this estate that his attorneys, Marvin Wellins and Daniel A. Weber be substituted as attorneys, for the plaintiff, George L. Gibbons, in said pending action against Joseph G. White, in the Superior Court, Los Angeles County, bearing No. 533306.”

VII.

That on or about June 16, 1948, an order was made by the Referee in Bankruptcy herein authorizing said substitution of attorneys, and thereafter and pursuant to said order a copy of the Substitution of Attorneys, executed by Marvin Wellins and Daniel A. Weber, George L. Gibbons and Jones & Wiener, was served by mail on July 13, 1948, upon Messrs. Cannon & Callister, who were then the attorneys of record for the respondent in said promissory note action, and the original of said Substitution of Attorneys, executed as aforesaid, was filed in the office of the County Clerk of Los Angeles County on July 19, 1948. At all times Marvin Wellins and Daniel A. Weber represented the Trustee herein in said promissory action and did not at any time represent George L. Gibbons, the original plaintiff in said action.

VIII.

That pursuant to said order of the Referee in Bankruptcy herein, dated May 25, 1948, confirming the trustee's aforesaid compromise with Gibbons, the Trustee in Bankruptcy herein released and relinquished any and all claims in favor of the Trustee in Bankruptcy herein against said Gibbons; that said Gibbons thereafter paid to the Trustee in Bankruptcy herein, pursuant to said compromise, \$3,000.00 in cash; and that Gibbons filed a stipulation in the above-entitled bankruptcy proceedings on July 14, 1948, withdrawing his claim theretofore filed in the sum of \$19,500.00 against the above estate.

IX.

That on or about July 15, 1948, Messrs. Wellins and Weber, ostensibly as attorneys for plaintiff, George L. Gibbons, but actually as attorneys for the Trustee herein, filed a motion for summary judgment in said promissory note action, which motion was noticed for hearing in Department 35 of said Superior Court on July 26, 1948. Said motion was thereafter continued to August 16, 1948.

X.

That on or about August 13, 1948, without knowledge of the compromise referred to in Paragraph V of these Findings, Messrs. Horowitz and Howard, attorneys for defendant (White) in said promissory note action (respondent in this proceeding), served a proposed amended answer and proposed cross-complaint in said promissory note action alleging that Gibbons had practiced fraud upon White in connection with White's execution of said promissory note to Gibbons. Said proposed amended answer and proposed cross-complaint did not assert any defense, claim, counterclaim or cross-complaint arising out of any of the claims alleged in the amended answer filed by White in this proceeding.

XI.

That on or about August 16, 1948, said motion for summary judgment duly came on for hearing before said Superior Court, and said motion was thereupon argued by Alvin F. Howard, of counsel for defendant White in said action.

XII.

That plaintiff's motion for summary judgment was thereupon granted, and an order of said Court granting said motion for summary judgment was thereupon entered.

XIII.

That on or about August 25, 1948, a judgment was entered in the Superior Court of the State of California, County of Los Angeles, in said promissory note action, entitled "Gibbons v. White," case No. 533306, which judgment was entered in book 1954, Page 37 of Judgments, in the office of the County Clerk of the County of Los Angeles. On or about December 14, 1948, said judgment in the sum of \$6220.00 was paid by respondent, and said \$6220.00 is now in the possession of the Trustee herein.

XIII—A.

That at no time prior to the payment and satisfaction of said judgment as aforesaid did the defendant in said action (respondent here), or his attorneys, assert any claim, counterclaim, defense or offset, or initiate any motion, proceeding or action in connection with the claims or matters alleged in the respondent's amended answer in this proceeding.

XIII—B.

That no appeal has ever been taken from said judgment, and the same became and was, at all times until the same was paid, satisfied and discharged by respondent as aforesaid, a final, valid and subsisting judgment.

XIII—C.

That no action or other legal proceeding was brought, filed or instituted by the respondent in respect to said judgment in the promissory note action or the proceeds of recovery therein prior to the filing of respondent's answer in this proceeding on August 24, 1949.

XIV.

That on or about March 16, 1948, the Trustee in Bankruptcy herein filed an action in the Superior Court of Los Angeles County, State of California, case No. 542157 against the respondent, who was the defendant in said action, based on an alleged oral agreement of partnership by and between the respondent and the bankrupt. Final judgment was entered in said action on May 16, 1949, in favor of the respondent adjudging that there was no oral or other agreement of partnership between respondent and the bankrupt, and that plaintiff, the trustee herein, take nothing by his complaint. That in said action the respondent asserted no affirmative claim, counterclaim or cross-complaint against the bankrupt or the trustee in bankruptcy herein.

XIV—A.

That at no time (except in the instant proceeding) has the respondent ever filed any claim or proof of claim, absolute, contingent, secured or otherwise, against the bankrupt or the bankrupt's estate in the above-entitled bankruptcy proceedings.

XV.

That on the date of the filing of the petition in bankruptcy in the above-entitled bankruptcy proceedings, to wit, August 6, 1947, said Gibbons was the owner and holder of said promissory note in the sum of \$5,000.00 executed and delivered by respondent to Gibbons; and on said date the trustee in bankruptcy herein had no right, title or interest of any kind in or to said note, or the cause of action evidenced thereby, or the proceeds of any recovery thereon.

XVI.

That on or about the same date that respondent made and executed the aforesaid \$5000 promissory note in favor of Gibbons, he also, as an accommodation to the bankrupt, made and executed a negotiable promissory note in favor of Morris Plan Bank of California in the sum of \$25,000, and the bankrupt made and executed to respondent a non-negotiable promissory note in the sum of \$30,000 as evidence of his obligation to respondent under the aforesaid two accommodation notes. That on the date of the filing of said petition in bankruptcy, respondent had not paid either of said notes executed by him, to wit, said promissory note in the sum of \$5000, nor the promissory note in the sum of \$25,000.00; nor had the respondent made any payment on account of either of said notes. The bankrupt at no time made any payment on said \$30,000 note, which is still unpaid. That on the date of the filing of the petition in bankruptcy in the above-entitled proceedings, the aforesaid promis-

sory note in the sum of \$30,000.00, executed and delivered by the bankrupt to respondent had not yet matured or become due or payable.

XVII.

That neither respondent nor his attorneys had knowledge prior to the month of March, 1949, of the aforesaid compromise by the trustee herein of his aforesaid action against Gibbons.

XVIII.

All of the allegations contained in the fifteen affirmative defenses set forth in Trustee's Reply filed herein are true, except all of the allegations contained in the following paragraphs, all of which are untrue: Paragraph VI of the First Affirmative Defense; Paragraph III of the Second Affirmative Defense; Paragraphs II and III of the Third Affirmative Defense; Paragraphs I, II, IV and VI of the Fourth Affirmative Defense; Paragraphs III and IX of the Fifth Affirmative Defense; Paragraphs X, XI and XIII of the Sixth Affirmative Defense; Paragraph II of the Seventh Affirmative Defense; Paragraph II of the Eighth Affirmative Defense; Paragraph II of the Ninth Affirmative Defense; Paragraph I of the Tenth Affirmative Defense; Paragraph I of the Eleventh Affirmative Defense; Paragraph I of the Twelfth Affirmative Defense; Paragraph II of the Thirteenth Affirmative Defense; and Paragraph II of the Fourteenth Affirmative Defense.

Conclusions of Law

I.

The Trustee herein was the real party in interest as party plaintiff in the action entitled "Gibbons v. White," No. 533306 of the Superior Court in and for the County of Los Angeles, State of California, from and after the time that this Court approved the Trustee's compromise of his claim against Gibbons on May 25, 1948. The Trustee's failure to disclose his interest in said action prevented respondent herein from asserting any offsets, defenses or claims which may have existed in his favor against the Trustee and respondent was entitled to have an opportunity to assert said offsets, defenses or claims.

II.

The trustee's claims in and to said assignment and said proceeds are derived from Gibbons and not from the bankrupt.

III.

The interest of the Trustee in the aforesaid promissory note action when considered in connection with the matters asserted in the respondent's amended answer herein do not involve mutual debts or mutual credits, nor can the matters asserted in the respondent's amended answer defeat the Trustee's interest under said assignment or his right to said proceeds.

IV.

The Affirmative Defenses I to XIV, inclusive, set forth in Trustee's Reply to Amended Answer are without merit.

V.

The Trustee is entitled to judgment and decree quieting title in him and to the aforesaid funds and monies in his possession and determining that the respondent has no interest therein.

Dated this 5th day of April, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S PETITION
TO QUIET TITLE TO FUNDS IN TRUS-
TEE'S POSSESSION

The petition of the trustee in bankruptcy in the above-entitled matter having come regularly on for hearing on October 4, 1949, January 27, 1950, and January 31, 1950, before the Honorable Benno M. Brink, Referee in Bankruptcy herein; Fred Horowitz and Alvin E. Howard, having appeared as attorneys for said respondent herein, and Marvin Wellins and Daniel A. Weber, having appeared as attorneys for the trustee in bankruptcy herein, and evidence, both oral and documentary, having been received, the Court being fully advised in the prem-

ises, having made and entered findings of fact and conclusions of law, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

(1) That the trustee is the sole owner of all funds now in his possession and that the respondent, Joseph G. White, has no right, title or interest in or to any funds in the possession of the trustee.

Dated this 5th day of April, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To Benno M. Brink, Esq., Referee in Bankruptcy:

Your petitioner, Joseph G. White, respectfully represents:

I.

Your petitioner is aggrieved by the Order herein of Benno M. Brink, Referee in Bankruptcy, dated April 5, 1950, a copy of which Order is annexed hereto, marked Exhibit "A" and made a part hereof.

II.

The Referee erred in respect to said Order in that the Referee's Finding V—A, that the Trustee in

bankruptcy herein acquired his interest in the \$5000.00 note and action based on said note for a valuable consideration furnished by the Trustee, is not supported by the evidence and is contrary to the evidence in that the evidence showed that said note and legal action were acquired in consideration of the Trustee's dismissal of the action referred to in Finding IV, which action was based on an assertion of rights belonging to and furnished by the Bankrupt.

III.

The referee erred in respect to said Order in that the Referee's Finding XV is erroneous. Finding XV declares that on the date of the filing of the petition in Bankruptcy herein, the Trustee in Bankruptcy had no right, title or interest of any kind in or to the aforesaid promissory note and cause of action. Said declaration is not supported by the evidence and is contrary thereto in that the evidence shows that said note was an accommodation note upon which the bankrupt was the party primarily liable and the bankrupt had an interest in said note in that it was delivered without consideration, being a payment on a usurious claim, so that the bankrupt had a right to secure the return and cancellation of said note on said date.

IV.

The Referee erred in respect to said Order in that Conclusion II, to the effect that the Trustee's claims in and to the aforesaid note and action based thereon were derived from Gibbons and not from

the bankrupt, is contrary to the law and is not supported by any findings of fact made by the Referee, nor by any that could be made under the evidence, because the trustee's claims were in fact claims which would have belonged to the bankrupt had there been no bankruptcy.

V.

The Referee erred in respect to said Order in that Conclusion III is contrary to the law and not supported by the findings of fact nor by any findings of fact which could have been made under the evidence.

VI.

The Referee erred in respect to said Order in that Conclusion V is contrary to the law and not supported by the findings of fact nor by any findings of fact which could have been made under the evidence.

Wherefore, petitioner prays for review by a Judge of this Court of the said Order of the Referee of April 5, 1950, and that upon such review, the said Order be reversed, the cause be remanded to the Referee with directions forthwith to make and enter an Order requiring the trustee to pay to petitioner the sum of \$6220.00, and for such other and further relief as the Court deems proper.

Dated: April 13, 1950.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Petitioner.

State of California,
County of Los Angeles—ss.

Joseph G. White, being first duly sworn, deposes and says: I am the petitioner named in the foregoing petition. I have read the said petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

/s/ JOSEPH G. WHITE.

Subscribed and sworn to before me this 14th day of April, 1950.

[Seal] /s/ MARGARET L. DAVIS,
Notary Public in and for
Said County and State.

Note: Petitioner requests that the following papers, or certified copies thereof, be transmitted to the Judge on this review:

1. Petition to quiet title to funds in possession of the trustee.
2. Amended answer to order to show cause.
3. Trustee's reply to amended answer of respondent White in proceedings to quiet title.
4. Order approving trustee's petition to quiet title to funds in trustee's possession dated April 5, 1950.
5. Findings of fact and conclusions of law in proceedings to quiet title.

6. All exhibits received in evidence at the hearings on the aforesaid petition to quiet title to funds in trustee's possession.

7. Reporter's transcript of proceedings at said hearings or a summary of the evidence in lieu thereof.

EXHIBIT "A"

In the District Court of the United States, Southern
District of California, Central Division

No. 45176 BH

In the Matter of
The Estate of AL HERD,

Bankrupt.

ORDER APPROVING TRUSTEE'S PETITION TO QUIET TITLE TO FUNDS IN TRUS- TEE'S POSSESSION

The petition of the trustee in bankruptcy in the above-entitled matter having come regularly on for hearing on October 4, 1949, January 27, 1959, and January 31, 1950, before the Honorable Benno M. Brink, Referee in Bankruptcy herein; Fred Horowitz and Alvin F. Howard, having appeared as attorneys for said respondent herein, and Marvin Wellins and Daniel A. Weber, having appeared as attorneys for the trustee in bankruptcy herein, and evidence both oral and documentary having been received, the Court being fully advised in the premises, having made and entered findings of fact and

conclusions of law, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

(1) That the trustee is the sole owner of all funds now in his possession and that the respondent, Joseph G. White, has no right, title or interest in or to any funds in the possession of the trustee.

Dated this 5th day of April, 1950.

BENNO M. BRINK,
Referee in Bankruptcy.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 14, 1950.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER IN RE DE-
MAND OF JOSEPH G. WHITE FOR
REPAYMENT OF MONEY PAID TO
TRUSTEE IN BANKRUPTCY

To the Honorable Ben Harrison, Judge of the
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby certify to the following:

Joseph G. White has duly filed his petition for the review of an order made by your Referee in this

matter, on April 5, 1950, in which he ruled that the said Joseph G. White was not entitled to recover from the trustee in bankruptcy herein the sum of \$6,220.00 which he had previously paid to the said trustee.

The Proceedings

This review results from proceedings had before your Referee in which White, the petitioner on review, sought to recover from Francis F. Quittner, the trustee in bankruptcy herein, the sum of \$6,220.00 which White had previously paid to the trustee pursuant to a judgment rendered in an action in the Superior Court of Los Angeles County which had been instituted by one Gibbons against White.

Prior to this bankruptcy, White, at the request of the bankrupt who was then in dire financial straits, gave Gibbons his note for \$5,000.00 to apply on the bankrupt's then existing indebtedness to Gibbons. At about the same time, White, at the solicitation of the bankrupt, gave his note for \$25,000.00 to Morris Plan Bank of California for and on behalf of the bankrupt.

White received no consideration for either of the said notes but, at the time, the bankrupt gave White his note for \$30,000.00 as evidence of the indebtedness on the part of the bankrupt which resulted from the giving by White of the said notes for \$5,000.00 and \$25,000.00 respectively. Nothing was ever paid on the said \$30,000.00 note.

In due course, Gibbons commenced the aforesaid

action in the Superior Court of Los Angeles County against White to collect the said \$5,000.00 note.

After the commencement of this bankruptcy proceeding, the trustee herein filed an action against Gibbons in the United States District Court upon the ground that he had collected certain usurious interest payments from the bankrupt and upon the further ground that he had received a preference, voidable in bankruptcy, when the aforesaid \$5,000.00 note was given to him. In the said action the trustee caused to be issued a garnishment in the sum of \$4,617.38, which garnishment was served upon White, as a debtor of Gibbons upon the aforesaid \$5,000.00 note. In due time, with the approval of your Referee, the said action against Gibbons was settled and compromised. As a result, the trustee released all of his claims against Gibbons and he, Gibbons, among other things, transferred to the trustee his aforesaid action against White which was then pending in the Superior Court of Los Angeles County. It is the contention of the trustee that Gibbons assigned only the proceeds of the said action but your Referee ruled otherwise and held that from and after the approval of the said compromise the trustee was the real party plaintiff in the said action. After the compromise, the attorneys for the trustee in this bankruptcy proceeding prosecuted the said action to judgment in the name of Gibbons as plaintiff. In satisfaction of such judgment, White paid the trustee the sum of \$6,220.00 and it is this payment which he seeks to recover here. The receipt which was given to White for the

said payment was signed by the attorneys for the trustee as "Attorneys for George L. Gibbons, in Case No. 533306, (the aforesaid action by Gibbons against White in the Superior Court of Los Angeles County) and Attorneys for Francis F. Quittner, Trustee in Bankruptcy of Al Herd, bankrupt."

During the course of this bankruptcy proceeding, the trustee herein brought suit against White in the Superior Court of Los Angeles County upon an alleged oral agreement of partnership between White and the bankrupt. The case went to trial and judgment resulted therein in favor of White.

After White had paid the trustee herein the aforesaid sum of \$6,220.00 he, the trustee, learned that White might institute proceedings to recover the said payment. Thereupon, in order to bring the matter on for determination the trustee, on August 20, 1949, filed in this proceeding his petition for an order to show cause requiring White to show cause why an order should not be entered quieting title in and to the funds held by the trustee and requiring White to answer the trustee's petition and to set forth therein any claim he might have in or to the said funds in the hands of the trustee. An order to show cause was duly issued upon the trustee's said petition and on August 24, 1949, White filed his answer in the matter in which he asserted (1) that the aforesaid \$5,000.00 note was a gratuitous accommodation to the bankrupt; (2) that counsel for the trustee herein had concealed from White the fact

that the trustee had become the owner of the said note and was, therefore, the real party in interest in the aforesaid action which had been commenced by Gibbons in the Superior Court of Los Angeles County; (3) that, accordingly, White was denied the opportunity in said action of asserting offsets and counterclaims which were available against the trustee; and (4) that, consequently, White was entitled to recover the aforesaid sum of \$6,220.00 which he had paid pursuant to the judgment in the said action.

The Matter was first heard by your Referee on October 4, 1949. At said time, counsel for the trustee contended that White was estopped and precluded from seeking to recover the money he had paid to the trustee and, thereupon, your Referee announced that before going into the merits of White's claim for the repayment of his money your Referee would first determine if White could have asserted any defenses or counterclaims against the trustee in the aforesaid Gibbons action if the trustee had caused himself to be substituted as party plaintiff in the said case.

After taking this phase of the matter here involved under submission, your Referee ruled that White had not had his day in Court on the questions here presented and that, accordingly, your Referee would hear and determine White's claim that he was entitled to recover the aforesaid money he had paid to the trustee.

Thereafter, White, with leave of this Court, filed

an amended answer and, later, the trustee filed his reply thereto.

White's position may be summarized thusly: That the aforesaid \$5,000.00 note was not enforceable against him by the trustee in bankruptcy in this proceeding because (1) White was merely an accommodation maker for the bankrupt on the said note, and (2) the said note was offset by the aforesaid \$30,000.00 note which had been given to White by the bankrupt and which was wholly unpaid and unsatisfied.

The trustee's position was (1) that the \$5,000.00 note was enforceable against White by the trustee in this case, and (2) that, in any event, White was estopped and precluded in the matter here before the Court (a) by the final judgment in the aforesaid Gibbons action and (b) by White's failure, in the aforesaid "partnership" suit to assert his right to recover the money which he had paid to the trustee pursuant to the judgment in the Gibbons action.

Your Referee heard the matter here involved on its merits on January 27th and January 31, 1950, and thereupon ruled that White was not estopped or precluded from asserting his right to the relief which he sought in this proceeding but your Referee further ruled that the \$5,000.00 note in the hands of the trustee in bankruptcy in this matter was enforceable against White and that he had no offset thereto and that, consequently, he could not recover the money he had paid in satisfaction of the judgment which had been rendered upon the said note.

On April 5, 1950, your Referee filed his findings of fact and conclusions of law and his order in the matter and it is from the said order that this review is taken.

The Questions Presented

The questions presented by this review are set forth in detail in paragraphs II-VI, both inclusive, of the petition for review which is going up with this certificate but, in the opinion of your Referee, the said questions may be summarized as follows:

(1) Was the \$5,000.00 note here in question enforceable against White by the trustee in bankruptcy in this proceeding?

(2) Was the \$5,000.00 note in the hands of the trustee offset by the bankrupt's indebtedness to White as evidenced by the \$30,000.00 note hereinbefore mentioned?

The Evidence

The evidence in this matter will be found in the reporter's transcripts and in the exhibits in the case, all of which are going up with this certificate.

Referee's Findings of Fact, Conclusions of Law and Order

The originals of your Referee's Findings of Fact and Conclusions of Law and Order in this matter are going up with this certificate.

Papers Submitted

The following papers are transmitted herewith:

1. Petition to Quiet Title to Funds in the Possession of the Trustee, filed August 20, 1949.
2. Order to Show Cause to Quiet Title to Funds in Possession of Trustee, filed August 20, 1949.
3. Answer to Order to Show Cause, filed August 24, 1949.
4. Affidavit in Reply to Statements made in Answer of Joseph G. White, etc., filed October 3, 1949.
5. Affidavit in Opposition to Claim of Joseph G. White, filed October 3, 1949.
6. Points and Authorities in Opposition to Claim of Joseph G. White, etc., filed October 3, 1949.
7. Respondent's Opening Brief, filed October 15, 1949.
8. Trustee's Reply Brief, filed October 22, 1949.
9. Respondent's Reply Brief, filed November 9, 1949.
10. Trustee's Supplemental Reply Brief, filed November 23, 1949.
11. Amended Answer to Order to Show Cause, filed December 19, 1949.
12. Trustee's Reply to Amended Answer of Respondent White, etc., filed January 25, 1950.
13. Objections to Proposed Findings of Fact and Conclusions of Law, filed March 8, 1950.
14. Trustee's Memorandum in Reply to Objections to Trustee's Proposed Findings; and objections to Proposed Findings of Respondent White, filed March 25, 1950.

15. Memorandum of Objections to Revised Findings submitted by Respondent Joseph G. White, filed April 1, 1950.

16. Findings of Fact and Conclusions of Law in Proceedings to Quiet Title, filed April 5, 1950.

17. Order Approving Trustee's Petition to Quiet Title to Funds in Trustee's Possession, filed April 5, 1950.

18. Petition for Review, filed April 14, 1950.

19. The following Exhibits:

(a) White's Exhibits 1 and 2.

(b) Trustee's Exhibit A for Identification.

(c) Trustee's Exhibits 1-15, except the following:

(1) Trustee's Exhibit 3 which is an excerpt from your Referee's Record of Proceedings in this bankruptcy case and which reads "5-19-48, petition to compromise re Gibbons granted."

(2) Trustee's Exhibit 15 which is the same instrument as Trustee's Exhibit 12.

20. Reporter's Transcript of Hearing on October 4, 1949, filed June 6, 1950.

21. Reporter's Transcript of Proceedings on January 27, 1950, filed January 31, 1950.

22. Reporter's Transcript of Proceedings on January 31, 1950, filed May 16, 1950.

Respectfully submitted this 22nd day of June, 1950.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed June 22, 1950.

In the United States District Court, Southern
District of California, Central Division
In Bankruptcy No. 45,176-BH

In the Matter of

AL HERD,

Bankrupt.

ORDER AFFIRMING REFEREE BRINK'S
ORDER DATED APRIL 5, 1950, QUIETING
TRUSTEE'S TITLE TO FUNDS IN HIS
POSSESSION

The trustee in bankruptcy herein having filed a petition on August 20, 1949, requiring petitioner on review Joseph G. White to show cause why the trustee's title in and to the funds in his possession should not be quieted and requiring said petitioner on review to set forth his claim, if any, in or to said funds; and an order to show cause bearing said date having issued by the Honorable Benno M. Brink, Referee in Bankruptcy, directed to said petitioner on review; the petitioner on review having filed an "answer" herein on August 24, 1949, and thereafter an "amended answer" on December 18, 1949; and the trustee having filed a "reply" to said amended answer on January 25, 1950; and the proceeding having duly come on for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy herein, on October 4, 1949, January 27, 1950, and January 31, 1950; Fred Horowitz and Alvin F. Howard, having appeared as attorneys for said petitioner on review, and Marvin Wellins and Daniel A.

Weber, having appeared as attorneys for the trustee in bankruptcy herein; after hearing the allegations and proofs of the parties, both oral and documentary, and being fully advised in the premises, the Referee having filed his findings of fact and conclusions of law on April 5, 1950, and having made an order on April 5, 1950, adjudging that petitioner on review had no interest in, and was not entitled to recover from the trustee, any of the funds in the trustee's possession, and quieting the trustee's title in and to the same, and said petitioner on review having filed on April 14, 1950, his petition for review by this Court of said order of the Referee made April 5, 1950; and the Referee's certificate of said proceedings, dated June 22, 1950, having been duly filed herein; and said petition for review having duly come on for hearing and argument before the Hon. Ben Harrison, Judge of this Court, on the 9th day of October, 1950; and Fred Horowitz and Alvin F. Howard, attorneys for said petitioner on review, by Alvin F. Howard, having appeared in support of said petition for review; and Marvin Wellins and Daniel A. Weber, attorneys for the trustee, having appeared in opposition thereto; and the parties having been duly heard; and after due deliberation the Court having made a minute order on November 13, 1950, affirming said order of the Referee dated April 5, 1950, and directing the trustee to present a formal order in respect thereto;

It Is Hereby Ordered, Adjudged and Decreed that the Referee's findings of fact and conclusions of law aforesaid, dated April 5, 1950, be and the same are

hereby adopted as the findings of fact and conclusions of law of this Court; and that said order of the Referee dated April 5, 1950, be and the same is hereby affirmed in all respects.

Dated: Dec. 4, 1950.

/s/ BEN HARRISON,

United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 4, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Joseph G. White, respondent upon an order to show cause issued herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court, Southern District of California, Central Division, dated and entered December 6, 1950, affirming the order of the Referee herein dated April 5, 1950, and adopting the Findings of Fact and Conclusions of Law of the Referee dated April 5, 1950.

Dated: January 2, 1951.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Joseph G.
White.

[Endorsed]: Filed January 2, 1951.

[Title of District Court and Cause.]

STATEMENT ON CASH DEPOSIT PURSUANT TO RULE 8(e) OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

The sum of Two Hundred Fifty (\$250.00) Dollars, in cash, is herewith deposited pursuant to Rule 8(c) of the local rules of the United States District Court, Southern District of California, Central Division, and Rule 73(c) of the Federal Rules of Civil Procedure. The fund deposited is owned by Joseph G. White, and said fund is hereby subjected to the aforesaid rules and is deposited in lieu of a bond and is conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed or of such costs as the Circuit Court of Appeals for the Ninth Circuit may award if the judgment is modified.

Dated: January 2, 1951.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Joseph G.
White.

[Endorsed]: Filed January 2, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant relies on two points only, the first point being that the decision of the United States District Court was contrary to law in its denial to appellant of the right of recoupment against the Trustee available to appellant on account of claims arising out of the transaction upon which the action entitled *George L. Gibbons v. Joseph G. White, et al.*, California State Superior Court action No. 533306, was based, and secondly, said decision was contrary to law in its failure to recognize that the compromise made by the Trustee with *George L. Gibbons* had the legal effect of extinguishing the promissory note which was the basis of the aforesaid action of *George L. Gibbons v. Joseph G. White*.

Dated: January 11, 1951.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Joseph G.
White, Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 11, 1951.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE
RECORD TO BE CONTAINED IN THE
RECORD ON APPEAL

Appellant designates the following portions of the record to be incorporated in the record on appeal herein:

1. Trustee's petition requiring Joseph G. White to show cause why Trustee's title in certain funds in the sum of \$6220 should not be quieted, filed August 20, 1949;
2. Amended Answer of Joseph G. White, filed December 18, 1949;
3. Trustee's reply to Joseph G. White's amended answer, filed January 25, 1950;
4. Findings of Fact and Conclusions of Law of Referee, filed April 5, 1950;
5. Referee's order approving Trustee's petition to quiet title to funds in Trustee's possession, filed April 5, 1950;
6. Petition for Review filed April 14, 1950;
7. Order of the United States District Court entered December 6, 1950, affirming the aforesaid order of the Trustee;
8. Trustee's petition for compromise, filed May 3, 1948, being Trustee's Exhibit No. 1;

9. The Referee's order approving the aforesaid compromise, filed May 25, 1948, being Trustee's Exhibit No. 4.

Dated: January 11, 1951.

FRED HOROWITZ,
ALVIN F. HOWARD,
By /s/ ALVIN F. HOWARD,
Attorneys for Joseph G.
White, Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 11, 1951.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL MATTERS AND PORTIONS TO BE CONTAINED IN THE RECORD ON APPEAL

Appellee hereby requests that the additional portions of the record hereinafter designated be incorporated in the record on appeal herein:

1. The order to show cause to quiet title to funds in possession of the trustee, filed August 20, 1949.
2. Reporter's transcript of hearing on October 4, 1949, filed June 6, 1950.
3. Reporter's transcript of proceedings on January 27, 1950, filed January 31, 1950.
4. Reporter's transcript of proceedings on January 31, 1950, filed May 16, 1950.

(By reason of the fact that all of said transcripts are now on file, no copies thereof are being submitted herewith.)

5. Notice to creditors and certificate of mailing thereof, filed May 6, 1948, which is trustee's exhibit 2.

6. Assignment executed by George L. Gibbons to the trustee in bankruptcy herein, dated June 19, 1948, which is trustee's exhibit 5.

7. Petition for leave to substitute Messrs. Wellins and Weber in the place of Jones & Wiener as attorneys for George L. Gibbons, filed June 16, 1948, which is trustee's exhibit 6.

8. Order authorizing substitution of Messrs. Wellins and Weber in place of Jones & Wiener as attorneys for George L. Gibbons, filed June 16, 1948, which is trustee's exhibit 7.

9. Receipt dated December 14, 1948, executed by Marvin Wellins and Daniel A. Weber, (by Marvin Wellins), which is trustee's exhibit 8 (and duplicated as trustee's exhibit 11).

10. The following papers in the action entitled "George L. Gibbons v. Joseph G. White" in the Superior Court of Los Angeles County, case No. 533,306: the complaint, answer; notice of motion and affidavits of George L. Gibbons, Donn B. Downen, Jr. and George M. Wiener, in support of plaintiff's motion for summary judgment, filed July 15, 1948; substitution of attorneys filed July 16, 1948; judgment after order granting plaintiff's motion for summary judgment, dated August 24, 1948; notice of entry of judgment, dated August 30, 1948, and filed

August 31, 1948; affidavit of service thereof by mail on Messrs. Horowitz and Howard on August 30, 1948; and satisfaction of judgment, dated December 13, 1948, entered on January 3, 1949. Said papers are a part of trustee's exhibit 9 (See pages 9-10, reporter's transcript of hearing on October 4, 1949).

11. The following papers in the action entitled "Francis F. Quittner, as trustee, etc., v. Joseph G. White," in the Superior Court of Los Angeles County, case No. 542,157: the complaint; answer, findings of fact and conclusions of law and judgment. Said papers are part of trustee's exhibit 10. (The complaint is duplicated as White's exhibit 2.)

12. The stipulation of George L. Gibbons withdrawing his claim in bankruptcy, which is trustee's exhibit 12.

13. The promissory note in the sum of \$5000.00 executed by Joseph G. White to George L. Gibbons, dated May 19, 1947, which is trustee's exhibit 15.

14. The promissory note executed by Al Herd to Joseph G. White in the amount of \$30,000.00, dated on or about May 19, 1947, which is trustee's exhibit . . for identification.

Dated: January 21, 1951.

MARVIN WELLINS, and
DANIEL A. WEBER,

By /s/ DANIEL A. WEBER,
Attorneys for Francis F. Quittner as Trustee, etc.
(Appellee).

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 22, 1951.

In the District Court of the United States for the
Southern District of California, Central Division
In Bankruptcy, No. 45,126-BH

In the Matter of

AL HERD,

Bankrupt.

Before the Honorable Benno M. Brink, Referee in
Bankruptcy.

REPORTER'S TRANSCRIPT, HEARING ON
ORDER TO SHOW CAUSE, TRUSTEE VS.
JOSEPH G. WHITE, OCTOBER 4th, 1949

Appearances:

For Francis F. Quittner, Trustee of said Bank-
rupt Estate:

MARVIN WELLINS, ESQ., and
DANIEL A. WEBER, ESQ.

For Joseph G. White:

FRED HOROWITZ, ESQ., and
ALVIN F. HOWARD, ESQ.

Tuesday, October 4, 1949. 2 P.M.

The Referee: We have the Order to Show Cause,
Trustee against Joseph G. White, on our calendar
for hearing at this time.

Mr. Wellins: Yes, your Honor.

Mr. Howard: That is correct.

Mr. Wellins: Out of consideration I would like, if we may, to read into the record here, or have marked the records that are here from the Superior Court.

The Referee: What are those?

Mr. Wellins: The Judgment Roll and the pleadings in the case of Quittner vs. White.

The Referee: I imagine there is not going to be much dispute about the facts here, and I think we should receive such evidence as you gentlemen desire to offer, and then I will submit it on briefs, because I want cases on the right of set-off in bankruptcy, and the first determining factor is going to be if the Trustee had substituted himself in the State Court action, could White have successfully asserted a setoff? I do not think we need to take time here to find out whether or not the bankrupt was indebted to White; although you gentlemen may have some views on it that maybe White was a partner of Herd, and so on. If we get that far, then, I shall restore the matter to the calendar and then find out whether there was any indebtedness from the [2*] bankrupt to White. I think, perhaps, there is only one question of dispute as to the facts here up to this point as to whether there was any indebtedness by Herd to White, and I think that one question upon which there may be some dispute is as to what the Trustee acquired in his compromise with Gibbons. Can you point out what evidence we have on that, counsel?

Mr. Wellins: Yes, if your Honor please.

The Referee: What is it?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Wellins: On May 25, 1948, as referred to on page 3 of our Affidavit here, an order was entered by your Honor confirming the Petition to Compromise, which reads in part as follows— (Interrupted.)

Mr. Horowitz: May we have the entire order read?

The Referee: Do you want to see it, Mr. Horowitz? Are you familiar with it?

Mr. Horowitz: No, I am not.

Mr. Wellins: I think it would be appropriate at this time for me to offer the original in evidence.

The Referee: Just a moment.

Mr. Horowitz: All right, your Honor.

The Referee: I suggest, gentlemen, that in order to have our record complete, that one or the other of you offer in evidence, first, the Petition to Compromise Trustee's Claim against George L. Gibbons, filed May 3, 1949. Do you want to do that? [3]

Mr. Wellins: Yes, we would like to do that.

The Referee: All right; Trustee's Exhibit No. 1 by reference—Petition to Compromise Trustee's Claim against George L. Gibbons.

Mr. Wellins: There is also an Exhibit A attached to that Petition—the settlement offer—which I would like to have included.

The Referee: Including Exhibit A thereof, filed May 3, 1948. Now, do you wish to offer the order?

Mr. Wellins: Yes, but, first, we would like to offer the Notice or the reference in the Court file, notice to the 134 creditors, dated May 6, 1948.

Mr. Horowitz: We object to it unless Mr. White was notified.

Mr. Wellins: We are not offering it for that purpose, but to show the legality of it.

The Referee: Is it stipulated that the offering of this Notice is not intended as proof that White received the Notice?

Mr. Wellins: Yes, your Honor.

The Referee: But merely as a procedure followed in connection with this Petition?

Mr. Wellins: Yes.

Mr. Horowitz: Yes, and we withdraw our objection to it.

The Referee: Then, Trustee's Exhibit No. 2 [4] by reference is the Certificate of Mailing and papers attached thereto, filed May 6, 1948. Now, do you want to offer the order?

Mr. Wellins: We next offer, by reference, the minute order of May 19, 1948, showing the Petition to Compromise the Trustee's Claim against George L. Gibbons, which came on for hearing and the petition was granted without opposition.

The Referee: Is that what it says?

Mr. Wellins: I don't know the exact language of it.

The Referee: Well, you have called it a minute order; it is not a minute order. We don't have anything like that. What is the date of it?

Mr. Wellins: May 19, 1948.

The Referee: What you wish to offer by reference is—and we will make it Trustee's Exhibit No. 3 by reference, Record of Proceedings dated May 19, 1948, reading: "Petition to Compromise re Gibbons granted."

Mr. Wellins: Next in order we offer, by reference, an Order entered on May 25, 1948, confirming said compromise.

The Referee: Trustee's Exhibit No. 4, by reference: "Order Approving Trustee's Petition to Compromise Trustee's Claim against George L. Gibbons, filed May 25, 1948." What else?

Mr. Wellins: We offer, next, Assignment of Proceeds to the Trustee, signed by George L. Gibbons, dated June 19, 1948. [5]

Mr. Howard: We have no objection to that.

The Referee: Trustee's Exhibit No. 5. What else?

Mr. Wellins: There is a document in the file of the Gibbons lawsuit, your Honor, relating to a substitution of attorneys, dated June 2, 1948.

The Referee: I do not have that.

Mr. Wellins: This might be an appropriate time to offer that, and for the purpose of the record it might be best to offer the entire file by reference.

The Referee: No, you can't offer anything by reference except what we have in our files here, and even then when you do that, if there is a review, you have to provide us with photostatic copies of each of these instruments received by reference.

Mr. Wellins: All right, your Honor, we offer by reference a document dated June 2, 1948, in the file of the case of George L. Gibbons against Joseph G. White, et al., in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 533,306 in the Superior Court of the State of California, in and for the County of Los

Angeles, entitled: "Substitution of Attorneys" and reading as follows—— (Interrupted.)

Mr. Howard: Why not supply the Court with a certified copy of it?

Mr. Wellins: All right. (Reading.) [6]

"Plaintiff George L. Gibbons hereby substitutes Marvin Wellins and Daniel A. Weber as his attorneys of record in the place and instead of Jones and Wiener, Esqs.

"Dated: January 2, 1948. Signed: George L. Gibbons."

Immediately following that on the same page:

"We consent to the above substitution.

"Jones & Wiener, by George M. Wiener."

Also, just below that, on the same page:

"Above substitution accepted.

"Marvin Wellins and Daniel A. Weber, by Daniel A. Weber."

The Referee: Filed when?

Mr. Wellins: Filed July 16, 1948.

The Referee: Do you want anything else out of that file?

Mr. Howard: Yes, we will want something else out of it.

The Referee: All right.

Mr. Wellins: Next, we offer a petition in this action of June 16, 1948, for an order authorizing Daniel A. Weber and myself to be substituted for Jones and Wiener as attorneys for Gibbons in his suit against White.

The Referee: June 16, 1948?

Mr. Wellins: Yes, your Honor.

The Referee: All right; Trustee's Exhibit 6 [7] by reference: Petition Authorizing Trustee's Attorneys to be Substituted in Pending Action, filed May 16, 1948. What else?

Mr. Wellins: Next in order, your Honor, we offer the record of proceedings of the Court in this matter on June 16, 1948, granting the petition.

The Referee: I don't think that means anything. There was no hearing in court on it. You have here a written order signed by the Referee, which is entitled: "Order Authorizing Trustee's Attorneys to Be Substituted in Pending Action," filed June 16, 1948.

Mr. Wellins: Yes, that is what I meant.

The Referee: Trustee's Exhibit No. 7 by reference: "Order Authorizing Trustee's Attorneys to Be Substituted in a Pending Action," filed June 16, 1948. What else?

Mr. Wellins: Affidavit of Publication by Mail contained in the Superior Court pleadings of the Gibbons case, referring to the mailing of the substitution of attorneys.

Mr. Howard: We stipulate to that.

Mr. Wellins: Do you stipulate that a copy of it was mailed to Cannon & Callister, attorneys for Joseph G. White, on July 13, 1948?

Mr. Horowitz: Yes, so stipulated.

The Referee: All right.

Mr. Wellins: We next offer the Complaint in the Gibbons matter, as well as the Answer, and the Judgment, and [8] ask leave to substitute copies

in place of the originals, which are in the Superior Court file.

The Referee: And what you had better do, then, is get photostatic copies of those instruments and have a stipulation here that as and when they are received here they may be marked exhibits next in order in this proceeding.

Mr. Howard: And there should be the affidavit upon which the Court granted the Summary Motion for Judgment.

The Referee: Well, let's find out what papers you want from that file.

Mr. Wellins: We want the Complaint, the Answer, the Notice of Motion, and Affidavits of George L. Gibbons, Donn B. Downen, Jr., and George M. Wiener in Support of Plaintiff's Motion for Summary Judgment, filed July 15, 1948; the Cross-Complaint on file by White against Gibbons——
(Interrupted.)

Mr. Howard: There is no Cross-Complaint on file.

The Referee: How did you get a Summary Judgment without that?

Mr. Wellins: It is entitled: "Proposed Cross-Complaint," but actually it was not filed, and leave was denied to file it, and I don't know whether it should be put in for completeness of the record or not.

The Referee: Whatever you want. If it was not filed, what are you going to do?

Mr. Wellins: We will omit that at this time. [9]

The Referee: All right. Next?

Mr. Wellins: Next, the Judgment after Order Granting Plaintiff's Motion for Summary Judgment, dated August 24, 1948, entered on August 25, 1948, in Book 1954 at page 307, filed August 24, 1948, with the notation: "An Acknowledged Full Satisfaction of the Within Judgment was filed 12-17-48. Attest: W. G. Sharp, County Clerk, under date of 1-3-49, by C. Escapete, Deputy." Also, Notice of Entry of Judgment dated August 30, 1948, filed August 31, 1948; and with Affidavit of Service by Mail on Messrs. Fred Horowitz and Alvin F. Howard, on August 30, 1948; and, finally, Satisfaction of Judgment, dated December 13, 1948, filed on the same date and entered on January 3, 1949, in Book 1954, at page 37.

The Referee: All right, you may produce photostatic copies of all those instruments and they will be marked as Trustee's Exhibit next in order. Now, what else have you?

Mr. Wellins: Have you with you the original of the receipt for the payment of the money on the Gibbons judgment?

Mr. Horowitz: I believe we have—yes, we have it.

Mr. Wellins: May I have it?

Mr. Howard: Surely.

Mr. Wellins: We next offer in evidence the receipt dated December 14, 1948, for the money obtained in satisfaction of the Gibbons judgment.

The Referee: Trustee's Exhibit No. 8. [10]

Mr. Wellins: Will you stipulate that no appeal has been taken from the Gibbons judgment, and

that no proceedings have been instituted to set it aside on any grounds?

Mr. Horowitz: Excepting in so far as this proceeding here is had, yes.

Mr. Wellins: Yes.

Mr. Howard: And it has been paid.

Mr. Wellins: Yes.

The Referee: Anything else?

Mr. Wellins: Have you with you the file in the case of Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt, Plaintiff, against Joseph G. White, et al., Defendants?

Mr. Howard: Yes.

Mr. Wellins: We ask for the same stipulation with regard to leave to have photostatic copies made and have them marked as exhibits here, in the Superior Court action of Quittner against White, being Case No. 542,157 of the Los Angeles County Superior Court.

Mr. Horowitz: All right.

Mr. Howard: Yes.

The Referee: All right.

Mr. Wellins: They are the Complaint——

Mr. Horowitz: There is no use building up a lot of costs against you or anybody else. This is your action against White. [11]

Mr. Wellins: The purpose is to show the applicability of Section 439 of the C.C.P., and if we can obtain from you at this time a stipulation we may be able to avoid a lot of trouble here.

Mr. Horowitz: All right; you may offer them.

Mr. Wellins: We offer the Judgment Roll in that case, your Honor.

The Referee: Very well. You are to get the photostatic copies and send them in here and we will mark those as the next exhibit in order. Anything else?

Mr. Wellins: That completes the documentary portion of the evidence.

The Referee: Does counsel have any further documents?

Mr. Horowitz: Nothing further. In connection with the action of Quittner against Gibbons there was a garnishment run on Mr. White as a defendant in the case of Quittner against Gibbons.

The Referee: I notice a file here from the Clerk's office; is that the file you refer to?

Mr. Horowitz: Yes, your Honor. We would like to offer in evidence the Return of Service of the Writ of Attachment, together with the Writ of Attachment in that particular action, and we will have photostatic copies made of them.

The Referee: They may come in and be marked as [12] White's Exhibits. Now, what else have you by way of documents?

Mr. Horowitz: In connection with the bankruptcy matter, the Petition for Allowance of Attorneys' Fees that is in your file, we would like to offer that as an exhibit.

The Referee: Have you any idea when that was filed?

Mr. Horowitz: Yes, January 7, 1949.

The Referee: Well, there are various petitions here. Here is a Petition for Allowance to Attorneys for Trustee, filed January 7, 1949.

Mr. Horowitz: That is it.

The Referee: All right; White's Exhibit No. 1 by reference: Petition for Allowance to Attorneys for Trustee, filed January 7, 1949. What else?

Mr. Horowitz: We have here a promissory note in the amount of \$30,000, executed by Al Herd in favor of Joe White, which was originally a part of the file in the Bankruptcy Court and was then used as an exhibit in the case of Quittner against White.

The Referee: Mr. Horowitz, are you offering that in support of your contention that Herd was indebted to White?

Mr. Horowitz: Yes, that is the only purpose of it.

The Referee: I suggest we leave that, because I am of the opinion that we might get into a lot of controversy over whether or not there was any indebtedness on the part of the bankrupt to White. I prefer to settle the legal [13] question first as to whether if the Trustee in Bankruptcy had substituted himself in the Gibbons action White could have pleaded any offset.

Mr. Horowitz: That is the meat of the coconut.

The Referee: Of course, there is this further situation: You contend the Gibbons suit was on a note upon which White was an accommodation maker. Now, that might, perhaps, have some inequities on the right of setoff, I don't know. However, I think we should allow both of those things to rest until we have decided the legal question, and when we have done that we will see how much further you gentlemen want to go into the case. Is there any further evidence as far as we are concerned now?

Mr. Wellins: No, your Honor.

Mr. Horowitz: No, your Honor.

The Referee: I am going to decide first, gentlemen, the right of offset, and from there you can, all of you gentlemen, offer any further evidence you may want to submit. However, counsel for the Trustee have filed some points and authorities here on this particular phase of the case to quiet title, and I suggest you gentlemen put in your points and authorities, and then counsel for the Trustee may have an opportunity to answer.

Mr. Horowitz: That is satisfactory to us.

The Referee: The matter is submitted on briefs, 10 and 5. [14]

Certificate

I, E. B. Bowman, hereby certify that on the 4th day of October, 1949, I attended and reported, as official court reporter, the proceedings at the hearing on the Order to Show Cause, Trustee vs. Joseph G. White, in the above-entitled and numbered matter, before the Honorable Benno M. Brink, Referee in Bankruptcy, and that the foregoing is a true and correct transcript of the proceedings had therein (exclusive of the argument) on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof (exclusive of the argument of counsel for the respective parties).

Dated at Los Angeles, California, this the 5th day of June, 1950.

.....

Official Court Reporter.

[Endorsed]: Filed June 6, 1950.

Friday, January 27th, 1950. 10:00 A.M.

The Referee: Al Herd. Everybody ready in this case?

Mr. Weber: Ready, your Honor.

Mr. Horowitz: Yes, your Honor.

The Referee: We are proceeding here this morning upon a petition to quiet title to funds in the possession of the Trustee, filed by the Trustee on August 20, 1949, upon which on the same day an order to show cause was issued requiring Joseph G. White to appear and show cause, setting forth his claim, if any, in or to certain funds or proceeds in the possession of the Trustee.

To that petition and in response to that order to show cause an answer was filed by Mr. White on August 24, 1949.

The matter thereafter came on for hearing on what day? I would like to get this record complete here. I think it was originally set for the 6th of September, 1949, and was thereafter continued to October 4, 1949, if my dates are correct, at which time it was partially heard and the Court took under submission the general question as to whether or not the respondent White could assert certain claims to offset. Thereafter on December 19, 1949, Mr. White filed an Amended Answer in the proceeding and as I understand it, for the purposes of the case now, that Amended Answer supersedes in its entirety the original answer filed. Is that [2] correct, Mr. Howard?

Mr. Howard: That is correct, if the Court please.

The Referee: In other words, the Amended Answer contains all of the defenses and claims of Mr. White?

Mr. Howard: That is correct, if the Court please.

The Referee: On January 25, 1950, the Trustee filed his Reply to the Amended Answer. Now, the papers that I have mentioned are the pleadings in this case. Is that correct, gentlemen?

Mr. Howard: Yes, if the Court please. In addition, there are some briefs which have been filed.

The Referee: I understand that, but I mean the actual pleadings in the law suit.

Mr. Howard: Yes.

The Referee: All right. This is off the record, Mr. Singeltary.

(Discussion off the record.)

The Referee: I think, gentlemen, that we should first take up the separate and distinct defenses which are alleged in the Trustee's Reply and see whether or not we can shorten this proceeding any.

Mr. Howard: If the Court please, may I make a formal motion? In the Complaint, or rather in the Amended Answer, there is a typographical error. In Paragraph V, the second line of that paragraph, it stated that Mr. White executed the note as an accommodation for Mr. Gibbons. That should have been [3] as an accommodation for Mr. Herd. This has been called to the attention of the attorneys for the Trustee and they had answered as though the word "Herd" were in there. They denied it was an accommodation for Herd or Gibbons because we had called this to their attention.

Mr. Weber: We recognize that to be an inadvertence.

The Referee: All right, you wish to amend by interlineation?

Mr Howard: We wish to amend by interlineation, to cross out the word "Gibbons" and insert instead the word "Herd."

The Referee: Very well. The Court by interlineation on line 5 of page 3 of the Amended Answer filed December 19, 1949, now strikes out the word "Gibbons" and inserts in lieu thereof the word "Herd."

Mr. Wellins: Your Honor, at 11 o'clock I have a hearing on a motion in Department 35 and in order to obtain a continuance in that matter I have been requested to ask permission to come over there for a few minutes if it is convenient for you to take your morning recess at that time, and then return to this Court.

The Referee: I assume there is no objection?

Mr. Howard: No, of course not.

The Referee: All right, will you tell me what time you want to leave here?

Mr. Wellins: Well, just a minute or two before 11. [4]

The Referee: All right, we will take the recess, if you will remind me of it if I overlook it, at 5 minutes to 11.

All right, now we are back to the separate and distinct defenses set forth in the Trustee's Reply to the Amended Answer.

I assume that it may be stipulated that the allega-

tions of Paragraph I of the first separate and distinct defense are true?

Mr. Howard: The positive allegations, if the Court please.

The Referee: Well, why not all of the allegations of Paragraph I?

Mr. Howard: Well, this is of the Trustee's Reply?

The Referee: Yes.

Mr. Howard: Well, if the Court please, in that Reply they deny certain allegations which were——

Mr. Wellins: No, the first affirmative defense.

Mr. Howard: Oh, the first affirmative defense. I'm sorry.

The Referee: Yes, the first separate defense, just Paragraph I is all I'm talking about.

Mr. Howard: Oh, yes, of course, if the Court please.

The Referee: That is true?

Mr. Howard: Yes.

The Referee: And Paragraph II, will that be stipulated? [5]

Mr. Howard: Yes.

The Referee: Now, Paragraph III I imagine is more or less of a conclusion, more a conclusion than an allegation of fact. It alleges: "Among the issues necessarily determined in said action were the issues of the plaintiff's (Gibbons) title in and to said promissory note, his right to maintain said action, and his right to recover judgment upon said promissory note."

Mr. Howard: If the Court please, this is a con-

clusion as to what was determined in that action. In addition, we are of the opinion or take the position that this was not relevant to the question presented in this case, which is not whether or not that Court was right in its conclusions but whether or not that judgment should stand by reason of the facts concerning the circumstances under which it was secured. We are not here attacking the judgment of the state court in that action. We are seeking to set the judgment aside, and its effect aside, because as we claim it was secured by fraud.

The Referee: Yes. All right. Now let's take the balance of this first defense. Paragraph IV: "By said judgment said issues were adjudicated and determined in favor of the plaintiff."

Well, that is another conclusion.

Paragraph V: "No appeal has ever been taken from said judgment, and the same became and was at all times until the [6] same was paid, satisfied and discharged by respondent White on December 17, 1948, a final, valid and subsisting judgment."

Well, that is true.

Mr. Howard: There is no doubt about that.

The Referee: Sixth: "By reason of the foregoing, the issues raised and tendered by respondent White in respect to the funds in the possession of the Trustee herein, and the matters and transactions alleged in the amended answer, are *res judicata*, and respondent White is concluded thereby; and respondent White is estopped and precluded from relitigating any of said issues or matters, or from asserting any claim, counterclaim or offset in re-

spect thereto, or to said funds, or the cause of action underlying said judgment.”

Mr. Howard: If the Court please, not only is that conclusion, we contend it is an erroneous conclusion.

The Referee: Well, unless counsel for the Trustee have something further to offer than has already been considered by the Court, I shall rule against them on their first separate defense, namely, their contention therein made that the judgment referred to in the state court in the Gibbons suit is *res judicata* here because I have already indicated that it is my conclusion that under all the circumstances of this transaction the respondent White, unless he is otherwise foreclosed by any other defense which you raise here, has a right to be heard on the matters that he is alleging here.

Mr. Wellins: We do have something further to add to that. [7]

The Referee: What is that?

Mr. Wellins: This particular defense, in the first place, is related to other defenses and related to the whole case, and it is rather difficult to isolate from the others.

In the first place, whether or not this Court has the jurisdiction to determine that question must be ascertained. In the second place, whether or not the facts admitted by the respondent White amount in themselves as a matter of law to a bar precluding him from asserting any such claim as he now makes must be ascertained; and in support of that there is before the Court a photostatic copy of various case

records that have preceded this showing the knowledge on the part of Mr. White of several factors which completely bar him and which substantiate the point of view of the Trustee that the state court judgment is *res judicata*. In other words, even going a step beyond the general premise of this defense of *res judicata* here, you have Mr. White's knowledge of the garnishment made by the Trustee many months before the state court action on the promissory note was determined, wherein Mr. White knew from the records before your Honor in evidence here that the Trustee in Bankruptcy had filed a garnishment for a certain amount of money based upon a claim that the Trustee had in a pending lawsuit mentioned in that garnishment, whereby the Trustee sought to recover damages and penalties from Mr. Gibbons for alleged usurious interest charged to the bankrupt for loans and for various other relief that [8] the Trustee was seeking.

The Referee: Well, let me see if I understand you now. Do you say that there is in evidence here in this matter now that I'm hearing now, not in the general bankruptcy case of Al Herd, an instrument showing that in action No. 533,306 in the Superior Court, being the case of Gibbons vs. White, the Trustee caused a garnishment to issue against Mr. White?

Mr. Wellins: Yes, your Honor. I think the date is the 20——

The Referee: Which exhibit is it?

Mr. Wellins: The garnishment was issued in the Federal Court action and served on Mr. White with

respect to the proceeds of the recovery in this state court action whose number your Honor just gave, and that was done on December 29, 1947.

The Referee: Do you know what exhibit that is?

Mr. Wellins: Well, yes, the exhibit we put in at the last hearing in this matter in this Court.

Mr. Howard: I can give the Court the number of that exhibit, I believe.

Mr. Weber: I wonder if I could clarify something.

Mr. Wellins: We said that we would furnish the photostats subsequent to the exhibit—I mean subsequent to the hearing, and they were subsequently furnished to the Court.

Mr. Howard: I think the original is in the court, the [9] original return on the garnishment. We have asked the Court's clerk to bring up file No. 7870-Y, and I believe the last paper in that file is the United States Marshal's return on the garnishment that was made on Mr. White.

Mr. Weber: I think the file in the Federal action, Quittner vs. Gibbons, No. 7870-Y, shows from the Marshal's return that the service of the garnishment issued out of that action was made on April 13, 1948. That appears in File 7870-Y.

The Referee: What is the date of that?

Mr. Weber: April 13, 1948, is the date on which the garnishment which was issued out of the action of Quittner vs. Gibbons in the Federal Court was served on the respondent White in this case.

Mr. Howard: I don't remember the date but there is no doubt it was served on Mr. White before

the termination and payment of the Gibbons judgment.

The Referee: I don't find it, gentlemen.

Mr. Weber: May I assist the Court? I think this is the return to which I have reference, your Honor (indicating).

The Referee: Well, you are calling attention to a paper filed April 21, 1948, in proceeding No. 7870-Y in the United States District Court for the Southern District of California, Central Division, in which Francis F. Quittner was plaintiff and George L. Gibbons defendant, and that paper is returned by the United States Marshal stating that he served the [10] annexed attachment on the therein named Joseph G. White on the 13th day of April, 1948.

Now, the next attachment is a Writ of Attachment issued by the Clerk on the 5th day of April, 1948, and it is just an ordinary Writ of Attachment. I don't think it mentions Mr. White.

Now, you say there is a return?

Mr. Howard: That is the return that I was referring to in the file.

The Referee: Oh, that is the return. I thought you meant a return by the garnishee.

Mr. Howard: No, if the Court please, that is the return I was referring to.

The Referee: Have you anything further to offer?

Mr. Wellins: As I understand it, your Honor, this file is in evidence by reference as a result of our last hearing on this matter several months ago,

including the attachment and the return on it.

The Referee: Yes.

Mr. Wellins: And I have to—in order to make our position clear before the Court, I shall have to briefly review a few of these salient facts.

The Referee: I don't want any argument, Mr. Wellins.

Mr. Wellins: No, I'm not going to devote it to any argument, but you asked whether the Trustee had anything to offer. [11]

The Referee: Any further evidence, yes.

Mr. Wellins: The information before the Court will have to be related with regard to *res judicata* and to many issues. The first is whether or not the parties and issues were so identical for the general principles of *res judicata* to be applicable; and the second is whether or not there is any evidence of fraud based upon the documents which are now before the Court in evidence, and their legal significance; and the third question is if the parties and issues are identical is there any reason why this Court should assume jurisdiction to set aside or vacate the effect of that particular Superior Court judgment.

Now I would like to address myself to the first of those propositions.

The Referee: No, you want to argue the case. I don't want any argument. I have gone over all that. I simply want to know if you have any further evidence.

Mr. Wellins: Yes, there is a tremendous amount of further evidence.

Mr. Weber: May I address the Court?

The Referee: If you have any further evidence.

Mr. Weber: We would like to inquire on this point: Are you ruling the matter is not *res judicata* on the ground of fraud——

The Referee: I'm sorry, sir. I am simply ruling your first defense is not well taken. [12]

Mr. Weber: In order to answer the Court's question whether we have evidence, we certainly have evidence on the question of fraud.

The Referee: All right, produce it.

Mr. Wellins: All right, we are going to call the attention of the Court to several factors, in addition to that garnishment of which I spoke, by way of additional evidence.

The Referee: I want you to present your evidence.

Mr. Wellins: It is already in evidence. It has to be pointed out to the Court.

The Referee: No, it doesn't. I don't want any argument. Have you any further evidence on that first separate and distinct defense?

Mr. Wellins: Well, I feel that the only way we can present our evidence is by referring to it, Your Honor.

The Referee: Yes, but I don't want any argument at this time. I don't want any summary of the evidence. I want to know if you have any further evidence to offer.

All right, I hold that the first separate and distinct defense is not well taken for the reason the Court finds that at the time of the judgment and the trial

in the case of Gibbons vs. White, case No. 533,306, the Trustee in Bankruptcy was the real party plaintiff in the case and that the defendant in the case at the time of the judgment had no knowledge of the fact that the Trusee was the real——

Mr. Weber: Oh, wait. [13]

The Referee: Gentlemen——

Mr. Wellins: We haven't said we had no evidence. You are deciding the case before we put on the evidence.

The Referee: I called for evidence. You just stand up and talk.

Mr. Wellins: We haven't yet put on our evidence.

The Referee: Counsel, I'm sorry, sir, but I am going to go forward with this case. You can only present evidence by calling a witness or offering documentary evidence. Do one or the other.

I am taking the adjournment you requested and when we reconvene that is what you will have to do.

Mr. Wellins: I would like to ask one question.

The Referee: Yes.

Mr. Wellins: From what Your Honor has stated—Your Honor has stated from the bench and have decided facts about whether or not Mr. White had knowledge. How has that been determined?

The Referee: Call me, Mr. Singeltary, when they are ready.

(Recess.)

The Referee: All right, any further evidence on the first defense?

Mr. Wellins: Your Honor, there is one further

document as part of the documentary evidence, and that is the receipt that Mr. White received from me when he paid the judgment. [14]

The Referee: Is that in evidence?

Mr. Wellins: No, it is not. I think Mr. White probably has that.

Mr. Howard: We looked through our file for that but apparently it has been misplaced. If you have a copy of that I will recognize it and we will permit the copy to be introduced. I am familiar with the terms of the receipt.

Mr. Wellins: I believe we have a copy, Your Honor, if we are able to find it.

Your Honor, I offer in evidence a carbon copy of a receipt dated December 14, 1948, and undertake to the Court that this is the same in language as the original.

The Referee: No objection to the copy?

Mr. Howard: No objection to the fact it is a copy. If the Court please, we searched our records for that and we are unable to find it. If the original should show up we would like to ask permission of the Court at that time to replace the copy with the original.

Mr. Wellins: Yes; we have no objection.

The Referee: All right. Does either side wish to offer any evidence in connection with the execution or delivery of this receipt?

Mr. Howard: Yes, if the Court please.

The Referee: Do you have any evidence you want to put on?

Mr. Wellins: May I complete what I was start-

ing to say [15] a moment ago? On the subject of documents we have, there is one other document I was about to mention, Your Honor.

The Referee: Yes.

Mr. Wellins: There is a withdrawal of the claim, a stipulation regarding the withdrawal of the claim of George L. Gibbons in this bankruptcy file, and we offer that as the Trustee's exhibit next in order by reference.

The Referee: Well, where is it?

Mr. Wellins: It is in the file which I imagine is before Your Honor.

The Referee: I know, but I have a file here which is very thick.

Mr. Wellins: While Mr. Weber is looking for that, to save time may I state the position of the Trustee——

The Referee: No, you may not. Do you have any evidence you wish to offer in connection with—go ahead with your evidence, counsel.

Mr. Wellins: On the subject of further evidence, the Trustee takes the position that the burden of producing any evidence on the subject beyond what is already in evidence is on the respondent White.

The Referee: Counsel, now let's all get along here. I have a difficult matter here. It is going to take a considerable time at best, and let's please go along as the Court requests. You have no further evidence. All right, do you wish to offer any evidence, counsel? [16]

Mr. Wellins: There is one thing I wish to make clear in the record. If they produce any evidence to

show that they had no knowledge of what was going on in regard to the claims of the Trustee's counsel in this case, then we will produce evidence, but at this time we offer no evidence on the subject of notice; but on the question of *res judicata*——

The Referee: I'm sorry, sir. That is plenty. Please be seated. Proceed, counsel.

Mr. Weber: Here is that stipulation the Trustee would like to offer as the next exhibit in evidence.

The Referee: All right, let's get these exhibits marked. Is there any objection to the receipt in evidence of the receipt for the money?

Mr. Howard: No, if the Court please.

The Referee: All right, that is 'Trustee's Exhibit 11.

Now, there is offered a stipulation withdrawing the claim of George L. Gibbons filed in this bankruptcy proceeding on July 14, 1948. Is there objection?

Mr. Howard: I wonder if I may have an opportunity to examine it?

The Referee: Yes, surely.

Mr. Howard: I don't know that it is relevant but I have no objection to its going into evidence, if the Court please.

The Referee: All right, Trustee's Exhibit 12 by reference, stipulation withdrawing claim of George L. Gibbons, [17] filed July 14, 1948.

Of course, it must be understood, gentlemen, that anyone who offers an exhibit by reference, if it is necessary to make up the Referee's record the person offering that exhibit must supply the Court

with a photostat thereof. Of course, if there is no record made of it then it isn't necessary.

All right, proceed, sir.

Mr. Howard: If the Court please, I would like to have myself sworn as a witness to testify with reference to the circumstances under which the receipt was given.

The Referee: All right, raise your hand and be sworn.

ALVIN F. HOWARD

called as a witness, being first duly sworn, testified as follows:

The Referee: Will you state your name in the record?

The Witness: Alvin F. Howard.

The Referee: All right, you may proceed, sir.

Direct Examination

By Mr. Horowitz:

Q. Mr. Howard, you are associated with me, that is Fred Horowitz, in the practice of law?

A. Yes.

Q. And in connection with the settlement of the judgment in the action of Gibbons vs. White, did you personally [18] handle that matter?

A. Yes, I did.

Q. Calling your attention to Plaintiff's Exhibit No. 11, which is dated—or Trustee's Exhibit No. 11, which is dated December 14, 1948, I will ask you whether before the original of that receipt was

(Testimony of Alvin F. Howard.)

given you had a conversation with Mr. Wellins, one of the attorneys for the Trustee?

A. Yes, I did.

Q. Where did that conversation take place?

A. In Mr. Wellin's office.

Q. And that is located where?

A. I don't recall where it was at that time. It is in a downtown office building. I don't recall the address.

Q. Who was present at that time?

A. Mr. Wellins, Mr. and Mrs. White and myself.

Q. Will you relate the conversation that was had at that time and place?

Mr. Wellins: If the Court please, we object to that. The receipt is in evidence. The receipt is signed. The receipt has been accepted. There has been nothing done by them towards repudiating the receipt. No party is permitted——

The Referee: Please don't argue, counsel. State your legal objection.

Mr. Wellins: Any conversation would be incompetent, irrelevant and immaterial. The receipt is and purports to be [19] a complete document and speaks for itself.

The Referee: Overruled.

A. Mr. and Mrs. White had arranged to provide the funds to pay off this judgment that had been secured in the Gibbons case, and I called Mr. Wellins and told him that we had made arrangements to make the payment, and we wanted the proceeding which had been started to sell Mr. White's home

(Testimony of Alvin F. Howard.)

stopped, and he said to come into the office with the money and he would stop the execution sale. Mr. and Mrs. White and I walked over to his office, and had the money there, and there was some question about the amount of costs and we agreed as to the amount of costs; and I said to Mr. Wellins, "How can we pay you this sum when you as attorney for the Trustee have a garnishment against us"; and Mr. Wellins said, "I will sign the receipt both as attorney for Mr. Gibbons and as attorney for the Trustee so that you may be assured that in making the payment to Mr. Gibbons you will not incur any danger of a duplicate payment to the Trustee." Whereupon Mr. Wellins dictated this instrument, Trustee's Exhibit 11, and handed it to me and I read it over, and since it protected us both on the judgment of Gibbons and in the payment of money which in my opinion at that time we were subject to a garnishment on——

Mr. Wellins: I move to strike the words "in my opinion."

The Referee: Motion granted.

The Witness: And since the receipt was signed by him [20] as attorney both for Mr. Gibbons and for Mr. Quittner, we executed it—or we accepted it, rather.

Mr. Horowitz: No further questions.

The Referee: Cross-examine.

(Testimony of Alvin F. Howard.)

Cross-Examination

By Mr. Wellins:

Q. Mr. Howard, the writ of attachment that you mentioned is this writ of attachment in the case of Francis F. Quittner as Trustee in Bankruptcy of Al Herd, Bankrupt, vs. Gibbons, No. 7870-Y in the District Court of the United States for the Southern District of California, Central Division; is that right?

A. Yes. I thought of it as a garnishment on Mr. White——

Mr. Weber: We object to that——

The Witness: I don't know whether that is the one or not. I was referring to it as the garnishment in this case, No. 7870-Y.

Mr. Wellins: I will move to strike the answer as not responsive.

The Referee: Motion granted.

The Witness: The attachment I was referring to was the one which was served, where the return was made in this exhibit which is in the file, by the United States Marshal.

The Referee: I'm sorry. Let me get this clear. I [21] don't object to two counsel participating in the case, but when one counsel is on his feet the other counsel will have to remain seated.

Q. (By Mr. Wellins): Well, now, in order to clear this up in my own mind, Mr. Howard, I show you the return of service on the writ of attachment in the Federal file just mentioned. A. Yes.

(Testimony of Alvin F. Howard.)

Q. Attached to the writ of attachment which I just showed you? A. Yes.

Q. And which is marked Exhibit No.—

The Referee: Which one?

Mr. Wellins: The attachment, Your Honor.

The Referee: It has not been marked as any exhibit. I think you said that the whole file was in evidence, but I don't know whether it is or not.

Mr. Wellins: I don't know whether it is, either, Your Honor.

The Referee: I doubt it very much. Wait a minute.

The Witness: Well, the answer is yes.

Mr. Wellins: Is the file in evidence, Your Honor?

The Referee: I doubt it. I don't see any reference to it.

Mr. Wellins: I see. Well, Your Honor, at this time I offer in evidence the writ of attachment of which I spoke. [22] I believe that counsel has a copy of it and it might be convenient for the Court if the copy—if we offered that copy in evidence.

Mr. Horowitz: This is the document, if Your Honor please, that was served upon Mr. White. It is a writ of attachment and garnishment. I have no objection to its being used.

The Referee: Trustee's Exhibit 13.

Mr. Wellins: Is there any letter attached to it which is not a part of it, Mr. Horowitz?

Mr. Horowitz: No, the letter is from the United States Marshal. That is the garnishment in connec-

(Testimony of Alvin F. Howard.)

tion with the writ of attachment.

The Referee: Very well.

Q. (By Mr. Wellins): And you say that Mrs. White was there on that occasion, Mr. Howard?

A. Yes.

Q. And the amount of this receipt, which is Trustee's Exhibit 11, was for checks totalling \$6220.00; is that correct?

A. I think that is correct. It would be on here. Yes, that is correct.

Mr. Wellins: If the Court please, we offer by reference the complaint in this case No. 7870-Y, Quittner vs. Gibbons, in the District Court of the United States in this District as the Trustee's Exhibit next in order. [23]

The Referee: Let me have it.

Mr. Horowitz: I think it is material. I don't like to make any objection at all. I really would like to have all of the evidence that the other side thinks is pertinent in. I will not make any objection.

The Referee: All right. However, may I caution you gentlemen that in such a situation as this one may well anticipate a review and perhaps an appeal, whichever way the Referee may decide it, and I caution you all against making your record too voluminous. I have a complaint here with a number of exhibits, all of which will have to be photostated and will have to be included in the record if it goes up. Now, I don't know why the estate should go to the expense of photostating this 23-page complaint with the exhibits thereto attached.

(Testimony of Alvin F. Howard.)

Mr. Wellins: We will withdraw the offer, Your Honor.

The Referee: All right.

Mr. Wellins: May I see the last exhibit, Your Honor?

The Referee: 13?

Mr. Wellins: Yes.

The Referee: All right (handing document to counsel).

Q. (By Mr. Wellins): Mr. Howard, I show you Exhibit 13 and ask you to state the date when this exhibit came into your possession.

A. I can't tell you that.

Q. Is it true that you became Mr. Gibbons' attorney—— [24]

Mr. Horowitz: You don't mean Gibbons.

Mr. Wellins: I'm sorry.

Q. Is it true you became the attorney for Mr. Joseph G. White on or about July 1st, 1948?

A. Well, it was shortly before the hearing on your motion for summary judgment which was—if you could give me that date I could fix the time.

Q. Our records indicate that the motion for summary judgment in the promissory note action was filed July 15, 1948.

A. Then I would say it was about July 1st that we represented Mr. White.

Q. I see. And would you say that on or about the date that you became counsel for Mr. White you received among other things this document or group of documents marked Trustee's Exhibit 13?

(Testimony of Alvin F. Howard.)

A. I can't tell you when we received it, counsel. Mr. Horowitz shows me a substitution of attorneys dated August 4th whereby we were substituted——

Q. That is 1948?

A. 1948—whereby we were substituted for Reed Callister who previously represented Mr. White in the Gibbons action, that is the state court action No. 533306. I do know that this writ of attachment—or it is the best of my recollection that we got it from Reed Callister and not from Mr. White, so Mr. White, I conclude from that, must have received [25] it before we represented him.

Q. I see; and you received it from Mr. Reed Callister, and can you fix the date?

A. No, I can't.

Q. Some time, in any event, prior to August 4, 1948; is that right?

A. I don't know whether we got it later or earlier. There were several cases in which Mr. Callister represented Mr. White, and from time to time we went over there and asked him if he had any files or information on this and he would get it for us if he had it, and I don't recall. This probably came into our office without my knowledge, and the first time I saw this was this last two weeks although it was in our office, I assume, for a considerable period before that. You will notice it wasn't filed. It wasn't in our file. I knew of the attachment but I hadn't seen that particular paper.

Q. I see. Is it true that you knew of the attachment and of the name of the action in which the

(Testimony of Alvin F. Howard.)

attachment was drawn at or about the time that you became the attorney for Joseph White in about July of 1948?

A. I think it was about then some time.

Q. Prior to the date of the receipt, that is prior to December 14, 1948, is it true that you attended various hearings of 21-A examinations of the respondent Joseph White in this Court in which Mr. Weber and myself appeared as attorneys [26] for the Trustee?

A. It is not true. I never attended such a hearing.

Q. Is it true that you knew that Mr. White had been examined by Mr. Weber and myself as attorneys for the Trustee prior to December 14, 1948?

A. I knew that he had been examined in such a proceeding because I had seen transcripts of that in Mr. Horowitz' office. I didn't examine them but I asked him, "What are these," and he said, "These are transcripts in the bankruptcy proceeding where Joe White gave testimony up there."

Q. And is it true that Mr. Weber and I as attorneys for the Trustee gave you and Mr. Horowitz our carbon copy of the 21-A testimony, including that of Mr. White,, some time in or about the month of July, 1948?

A. Yes. I understood that you had let us use your copies of the 21-A testimony of Mr. White; and so I will make it clear, I state that I knew you and Mr. Weber represented the Trustee in Bankruptcy.

(Testimony of Alvin F. Howard.)

Q. And when did you know that?

A. Oh, I don't know when I first acquired that information.

Q. It is also true, is it not, that you knew that information prior to December 14, 1948? You had that information prior to December 14, 1948?

A. At the time—that is the time we paid off on the Gibbons judgment? [27]

Q. Yes.

A. I knew that you represented the Trustee in Bankruptcy at that time, and I knew it somewhat prior to that time.

Q. When did you first learn it? What was the occasion?

A. I don't know when I first learned it, nor do I know or recall the occasion of it, but I assume it was in connection with our representation of Mr. White. That would be the only way I could know.

Q. It was before the motion for summary judgment was made in the promissory note action that you learned that; is that true?

A. I think it was, although I'm not certain. It now comes to me how I knew it. I was familiar with the fact that Mr. White was being sued by the Trustee in the partnership action and that you were the attorneys for the plaintiff in that case. That is how I found out.

Q. So we have some idea of dates on this thing, Mr. Howard, I show you a copy of a letter written by Mr. Weber to Mr. Horowitz, with whom you are associated, on April 29, 1948, in connection with

(Testimony of Alvin F. Howard.)

those volumes of the transcript of the 21-A examination in the Herd bankruptcy which were loaned to you and which were examined by you, and call to your attention that you knew at that time that Mr. Weber and I were the attorneys for the Trustee in Bankruptcy here.

A. If you are asking for my personal knowledge, I can't say that I knew because of this letter because Mr. Horowitz [28] handled the Quittner vs. White case and I knew it was in the office and I knew generally the nature of the action and who the attorneys and parties were, but I didn't necessarily see all the correspondence.

Q. No, I didn't ask you whether you saw this letter. I merely show you the letter to call your attention to the date when you knew we were attorneys for the Trustee.

A. I don't think I necessarily knew it at that time.

Q. I also show you another letter dated May 12, 1948, addressed to Mr. Horowitz, enclosing additional volumes of the transcript for your office to examine, and I will ask you whether you knew on May 12th that Mr. Weber and I were the attorneys for the Trustee in this matter?

A. I may have known or I may not have known. I can't tell you when I first acquired that information. As I said, I found it out in connection with my knowing of the Quittner vs. White partnership case.

Mr. Horowitz: If it would be of any assistance,

(Testimony of Alvin F. Howard.)

I would be quite willing to stipulate, if your Honor please, that I knew that Messrs. Wellins and Weber were attorneys for Mr. Quittner as Trustee for the Estate of Al Herd during the month of March, 1948, if that will be of any consequence. That happens to be the fact.

The Referee: Very well.

Mr. Wellins: Thank you. We accept the stipulation.

The Referee: All right; go ahead. [29]

Q. (By Mr. Wellins): Now, did you know in or about July of 1948, that the law firm of Jones & Wiener was the counsel for George L. Gibbons in the promissory note action?

A. I can't tell you the exact date but perhaps it will be helpful if I tell you this: My recollection is that Joseph White was represented by Cannon & Callister in the Gibbons action and that the motion for summary judgment was filed before we were substituted in and became familiar with that action. We were representing Mr. White in the Quittner vs. White case, which is the partnership case. Then later we heard of the Gibbons action against Mr. White, or I did, I heard of the Gibbons against White, and Mr. Horowitz was handling the partnership case and turned over to me the defense of the summary judgment motion in the Gibbons case, and——

Q. Excuse me just a moment. I wanted to find out about your knowledge of Jones & Wiener.

A. That is what I'm coming to; and when I received the file in the Gibbons case, that is when I

(Testimony of Alvin F. Howard.)

found out that Jones & Wiener, by looking at the file, were the original attorneys for Mr. Gibbons and that they had been substituted out, and I am assuming that was in our file we received from Reed Callister, and that you had been substituted in as attorneys for Mr. Gibbons.

Q. You mean by that, Marvin Wellins and Daniel A. Weber?

A. Yes. Whether I received that file on July 10th or [30] later I can't tell you, but it was some time along in there.

Q. Very well. That was in the year 1948?

A. Yes.

Q. And did you also know in the month of July, 1948, that Mr. Weber had his offices in Beverly Hills and that I had my offices downtown in the Subway Terminal Building at 417 South Hill Street?

A. Oh, I don't know whether I knew it or not. It must have been on your pleadings but I can't say I knew where your offices were until such time as you moved into the building where we are now located.

Q. As a matter of fact, you knew where my office was when you came up to my office on December 14, 1948, in connection with the receipt in evidence?

A. Yes. That is the first time I found out where your office was actually.

Q. You knew that Mr. Weber and I were not engaged in the general practice of law together or

(Testimony of Alvin F. Howard.)

sharing offices together but were merely working as co-counsel for the Trustee in this matter?

Mr. Horowitz: We will object to that as immaterial.

The Referee: Sustained. Proceed.

Q. (By Mr. Wellins): Did you in the month of July, 1948, attend a meeting in your office with Mr. Weber and Mr. Horowitz in relation to the promissory note action and other actions then pending between the Trustee and Joseph G. White? [31]

A. I attended a conference in Mr. Horowitz' office at which Mr. Horowitz, myself, and my recollection is both you and Mr. Weber, were present, yes. What month it was I don't recall. I think it was prior to the hearing on the motion for summary judgment in the Gibbons action.

Q. That is correct. Are you sure that I was there, Mr. Howard?

A. No, I'm not, but I have that recollection. I'm not positive. I think both of you were there.

Q. As a matter of fact, isn't it correct that just Mr. Weber was there and not myself?

A. It is possible. My recollection of the meeting is that both of you were there. I might well be wrong.

Q. All right, during that meeting about July, 1948, is it true that there was discussion among Mr. Horowitz, yourself, and Mr. Weber about the settlement of three lawsuits, namely, the lawsuit in which the Trustee was suing Mr. White for unlawful eviction, the lawsuit in which the Trustee was suing

(Testimony of Alvin F. Howard.)

him for a partnership accounting, and the promissory note action?

A. There was a discussion of each of those actions as I recall.

Q. And there was also a discussion of how much money would be acceptable to the Trustee in full settlement of those three actions; is that correct?

A. Well, it all depends on what you mean by "discussion." [32] We made an offer and Mr. Weber turned on his heel and walked out.

Q. I am not implying that there was an acceptance of the offer, but you made an offer of a lump sum of money for the settlement of those three suits; is that correct?

A. Well, that is not quite correct. Do you want me to tell you what my recollection is of the conversation?

Q. Well, I want you to tell me whether or not it is true that there was a discussion among the——

Mr. Horowitz: Just a moment. I think the witness should be entitled to give his recollection of the discussion that was had there.

The Referee: Yes. The witness doesn't necessarily have to give you his conclusion on anything. He may relate what was said, what all the parties said.

Mr. Wellins: Well, let me reframe the question so we can get that answer in the record. Tell us, Mr. Howard, what was said by the parties present on the subject of a lump sum settlement of those three actions.

Mr. Horowitz: The witness didn't say there was

(Testimony of Alvin F. Howard.)

a discussion of a lump sum settlement of those three actions. He said it wasn't correct and then he was stopped and not permitted to answer. I think the witness should be permitted to state what took place.

The Referee: The witness may state the conversation.

Mr. Wellins: State the conversation, please, [33]
Mr. Howard.

A. My recollection of it was that at that time we were most concerned in trying to——

Mr. Weber: No.

The Referee: Counsel, let's please abide by the orders of the Court with respect to the carrying on of this case.

Mr. Weber: Very well, Your Honor.

The Referee: If you can't do it then I am going to restrict you to one counsel; but please don't give us any background, Mr. Howard. Just tell us the conversation.

The Witness: Well, the tenor of the conversation was this, that we made an offer to pay the sum of \$5,000.00 which would be received by the Trustee in Bankruptcy; that by virtue of his attachment of Mr. White on the Gibbons note we would pay that sum, the Trustee would get it, and you, the attorneys for Mr. Gibbons and attorneys for the Trustee, would dismiss with prejudice the action of Quittner vs. Rosen, as I recall, the action of Quittner vs. White, and the Gibbons action.

Q. (By Mr. Wellins): Just so we tie it together, when you say Quittner vs. Rosen, that was the unlawful eviction case, and the Quittner vs.

(Testimony of Alvin F. Howard.)

White was the partnership action, and the other was the promissory note action?

A. The Gibbons action.

Q. The action between Gibbons and White.

A. Yes. We made that offer, for which there was to be [34] a dismissal with prejudice of each of those actions.

Mr. Wellins: No further questions.

The Referee: Any further questions?

Redirect Examination

By Mr. Horowitz:

Q. Mr. Howard, did you know at that time or at any time prior to the payment of the money to Mr. Wellins shown in the receipt, Trustee's Exhibit 13, that the proceeds of the judgment or any interest in the judgment was owned by Mr. Quittner as Trustee for Al Herd?

Mr. Wellins: That is objected to as assuming facts not in evidence. The date of the judgment was far later than that so there could not have been any such discussion in those words.

The Referee: Overruled.

The Witness: Up to the time that judgment was paid and continuing through and after that time, I did not know that Mr. Quittner as Trustee had any interest in the action that Mr. Gibbons was bringing. In fact, at the time that we paid Mr. Gibbons, or thought we were paying Mr. Gibbons, I was worried that we would be faced with a demand at a subsequent time, for a subsequent payment, by Mr.

(Testimony of Alvin F. Howard.)

Quittner, and that was the reason we requested it be signed by Mr. Wellins as attorney for each of those parties.

Mr. Wellins: I move to strike everything after the [35] word "no" as not responsive to the question and as being a conclusion of the witness.

The Referee: Motion denied.

Q. (By Mr. Horowitz): And did you so tell Mr. Wellins? A. Yes, I did.

Mr. Horowitz: That is all.

The Referee: Any further questions?

Recross-Examination

By Mr. Wellins:

Q. When was the first time that you found out about the pendency of the bankruptcy matter of Al Herd, bankrupt?

A. When I heard—when I first heard about the fact that Joe White was being sued by the Trustee in Bankruptcy.

Q. And what year was that? A. 1948.

The Referee: Well, that was before you paid the judgment, wasn't it?

A. Yes, considerably before we paid the judgment.

Q. (By Mr. Wellins): Did you at any time make an investigation of the records of the bankruptcy court in the matter of Al Herd, bankrupt?

A. Yes, I did.

Q. When?

(Testimony of Alvin F. Howard.)

A. The first examination that I recall was toward the end of our trial in the partnership [36] case.

The Referee: When was that, sir, what year?

A. We have the case in court here. It was in 1948, I believe.

Q. (By Mr. Wellins): What month in 1948?

Mr. Horowitz: Well, the trial——

Mr. Wellins: Just a second, if the Court please.

The Court: What are you doing, trying to trap this witness? Counsel is looking at the file.

Mr. Wellins: I'm trying to examine the witness without the assistance of counsel.

The Referee: I know, but after all, let's get along here. Counsel has the file. When was the trial?

Mr. Horowitz: The trial commenced on March 14th and the trial dates were March 14, 15, 16, 17, 31, 30, April 4, 5, 6, 8, 11, 12, 13, and 15.

I get that from the judgment.

The Referee: That settles that.

The Witness: It was I would say between the 1st and 15th of April, 1949.

Q. (By Mr. Wellins): And was that the first time, was that the first occasion that you ever examined the records of the Al Herd bankruptcy?

A. I think I may have looked at it earlier than that in the trial. The reason I recall this second occasion or other occasion so distinctly is that is the time I found in the file the facts with reference to the Trustee's interest [37] in the Gibbons action.

(Testimony of Alvin F. Howard.)

That is the first time I found that, but I may have examined the file earlier for a different purpose.

Mr. Wellins: All right. Now I move to—well, never mind. Let it stand.

The Referee: All right.

Q. (By Mr. Wellins): When did you first examine the records or files in the matter of Al Herd, bankrupt?

A. The very first time was at or about—let's say the beginning of the trial.

Q. The trial dates of which Mr. Horowitz just read off?

A. Yes, the end of March or the early part of April.

Q. Of 1949? A. Right.

The Referee: All right, gentlemen, it is 12 o'clock. This is off the record, Mr. Singeltary.

(Discussion off the record.)

The Referee: All right, continued to January 27th, today at 1:30 p.m.

(Whereupon a recess was taken until 1:30 o'clock p.m.) [38]

Friday, January 27th, 1950—1:30 P.M.

The Referee: Any further questions of Mr. Howard?

Mr. Wellins: Yes, if the Court please.

Q. Mr. Howard, did you know that the Trustee was suing Mr. Gibbons for damages for usurious interest charged Mr. Herd? A. Yes.

Q. You knew about the case which has been described as No. 7870-Y? A. Yes.

(Testimony of Alvin F. Howard.)

Q. Quittner vs. Gibbons? A. Yes.

Q. And when did you first examine the file in that case?

A. The file itself will contain the date of my first examination. I went up there and got photostats of certain of the pleadings and the date that I got those photostats appears in the file, and that is the date that I first saw it.

Mr. Wellins: Very well. Does Your Honor have that file?

The Referee: What became of that one?

The Witness: That was before the motion for summary judgment was heard, however, if that is helpful. [39]

Q. (By Mr. Wellins): All right, passing from that until we get the file, for the moment, can you tell me the date of the receipt—oh, withdraw that question, please.

Can you by referring to the file in case 7870-Y which I now show you tell me that date, Mr. Howard? A. Yes; August 12, 1948.

Q. Thank you; and at that time you read the file in that case; is that correct?

A. Yes, I did.

Q. All right. Now can you tell me the date upon which you received the file in the promissory note action from Cannon & Callister's office?

A. I can't tell you exactly except that my recollection is that it was shortly after you had made your motion for summary judgment.

(Testimony of Alvin F. Howard.)

Q. I see. Would you say within a month after that, or can you——

A. I think it was less than that. I think it was heard within a month after that.

Q. Within a week?

A. I don't know. My recollection is that at the time I first saw the file your motion had been made and needed to be defended, and that was the status of the file when I first saw it.

Q. All right, the motion was filed about July 15, 1948, so would it be accurate to say that you received those papers [40] from Cannon & Callister's office say one week following that date?

A. I'm sorry, I can't tell you whether it was a week or a month or two weeks, but my recollection for what it is worth is that it was shortly after the motion was filed, which would be shortly after July 15th; but whether that "shortly after" means a month or a week I can't tell you.

Q. Somewhere not over a month?

A. I feel certain that is correct.

Q. Do you have some receipt that indicates the transfer of papers to you from the Cannon & Callister office?

A. I don't believe so. Mr. Horowitz has the file.

Mr. Horowitz: If this would be of any value, I notice in our file a letter from Cannon & Callister to Mr. White in which he states he has been served with notice of motion and affidavit and substitution of attorneys in the Quittner vs. White suit; and then he states: "Since most of your matters

(Testimony of Alvin F. Howard.)

are now being handled by Mr. Horowitz, it occurs to me this matter should also be handled by him. I would appreciate a telephone call from you in this regard"; and the substitution of attorneys is dated August 4th and I notice there was a copy mailed to Messrs. Wellins and Weber on the 4th of August; so it would be some time between July 14th and August 4th.

Mr. Wellins: July 14th is the date of the letter to which you had reference in the beginning of your remarks? [41]

Mr. Horowitz: Yes. That wasn't a letter to me. It was a letter to Mr. White who brought it into the office, and between that date and August 4th we got the file.

Q. (By Mr. Wellins): Now, Mr. Howard, is it true at the same time you were present at the conference with Mr. Weber about which you testified, that at the conclusion of the conference you served upon Mr. Weber at your office an Amended Answer to the promissory note action, and a Cross-Complaint?

A. I don't know when that was served with reference to the time of the conference.

Mr. Wellins: No further questions.

The Referee: Any further questions?

Mr. Horowitz: No, no questions.

The Referee: All right, step down. Any further evidence on the first defense? Have you any, counsel?

Mr. Wellins: Do I understand that you have

nothing further to put on, Mr. Howard?

The Referee: You put on what you want to put on and then we will ask the other side.

Mr. Wellins: Well, we will wait until Mr. White is examined, Your Honor, to see whether there is any further evidence we wish to offer.

The Referee: All right, do you gentlemen have any evidence?

Mr. Howard: Yes, if Your Honor please. [42]

JOSEPH G. WHITE

called as a witness, being first duly sworn, testified as follows:

The Referee: And what is your name?

The Witness: Joseph G. White.

The Referee: All right, proceed.

Direct Examination

By Mr. Howard:

Q. Mr. White, at the time that the judgment was paid in the Gibbons action against you, that is at the time of our visit to Mr. Wellins' office when you gave him some checks, did you know at that time that the money was being paid on an obligation to Mr. Quittner as Trustee?

A. No, I didn't.

Mr. Wellins: If the Court please, I move to strike the answer for the purpose of making an objection; and I object to the——

The Referee: Wait a minute. Motion granted. Proceed with your objection.

(Testimony of Joseph G. White.)

Mr. Wellins: I object to the question on the ground that it calls for the opinion and conclusion of the witness, on the ground that it is contrary to and an attempt to falsify the contents of the receipt which is Trustee's Exhibit 11 in evidence, and on the ground that it is incompetent, irrelevant and immaterial.

The Referee: The objections are overruled. The answer [43] may stand in the record.

Q. (By Mr. Howard): And to whom did you believe the money was being paid?

Mr. Wellins: The same objection, if the Court please, as calling for the opinion and conclusion of the witness and an attempt to vary the terms of the receipt.

The Referee: Overruled.

The Witness: I thought it was paid to Mr. Gibbons.

Mr. Howard: No further questions of this witness at this time, if the Court please. I understand the evidence now is being limited to a particular defense.

The Referee: Just the first defense, yes.

Mr. Howard: Yes.

The Referee: All right, cross-examine.

Mr. Wellins: May I see the receipt, if Your Honor please?

The Referee: Yes (handing document to counsel).

(Testimony of Joseph G. White.)

Cross-Examination

By Mr. Wellins:

Q. Mr. White, I show you this receipt marked Trustee's Exhibit 11 and ask you whether this is a copy of the receipt that was received by you at that time?

A. I never did receive the receipt. I think you gave it to Mr. Howard.

Q. I see. Is this a copy of the receipt that was given [44] to Mr. Howard at that time?

A. I have never seen it other—

The Referee: There is no question about that, Mr. Wellins. That is the receipt.

The Witness: I have no doubt it is the receipt but I didn't see the receipt. You gave it to Mr. Howard.

Q. (By Mr. Wellins): Now, when this receipt was prepared you were sitting in my office; is that right? A. That is right.

Q. And I dictated this to my secretary in the presence of you and Mr. Howard; is that correct?

A. That I don't recall.

Q. You heard me say in part, "These checks have been delivered to me as one of the attorneys for Francis Quittner, as Trustee in Bankruptcy of Al Herd, bankrupt, and receipt is acknowledged on behalf of Francis Quittner, as said Trustee, and as payment in full of the claim of George L. Gibbons against Joseph White, et al., Case No. 533306, Los Angeles County Superior Court, subject to any

(Testimony of Joseph G. White.)

adjustment which may be appropriate for disbursements to Sheriff, as the same may be hereafter ascertained"; is that correct?

A. I don't remember. I don't remember you dictating that in the office in my presence. I'm not saying you didn't, but I say I don't remember. If you did I didn't pay any attention to what you were dictating.

Q. However, you were there, were you not? [45]

A. Absolutely.

Q. Mr. White, you knew, did you not, that on the day we got those—the day I received those checks, namely December 14, 1948, that the Trustee was going to get that money; is that right?

A. No, I didn't. I didn't owe Al Herd any money. Al Herd owed me money.

Q. My question is did you know that the money that you gave—that is, the two checks—to me, was going to go to the Trustee in Bankruptcy of Al Herd? A. No, sir, I didn't.

Q. Mr. White, I call your attention to the suit that was filed against you by Mr. Gibbons for the \$5,000.00 note. Is it true that you had certain negotiations with Mr. Gibbons in an attempt to settle that lawsuit? A. Yes.

Q. And is it true that those negotiations took place in the spring of 1948?

A. I think it was.

Q. And is it also true that in the course of those negotiations you had conversations with Mr. Gibbons in which he stated to you in substance,

(Testimony of Joseph G. White.)

“Mr. White, if you want to settle this matter you had better do so promptly because I am negotiating for a settlement with the Trustee in Bankruptcy”?

A. No, sir, absolutely not. [46]

Q. Is it true, Mr. White, that you had a conversation with Mr. George M. Wiener, one of the attorneys for Mr. Gibbons, prior to the time Mr. Weber and I became Mr. Gibbons’ attorneys, in which in the spring of 1948 Mr. Wiener stated in substance to you, “Mr. White, if you wish to effect a compromise of your claim with Mr. Gibbons you had better act promptly because Mr. Gibbons is negotiating a compromise of his claim with the Trustee in Bankruptcy of Al Herd”?

A. You are asking me if Mr. Wiener told me that?

Q. I am asking you if Mr. Wiener told you that, in substance and effect?

A. Never, in no way whatsoever, in any respect. Mr. Wiener did call me into his office and wanted me to give him a 1947 Cadillac convertible.

Q. In settlement of that action?

A. In settlement of that action, yes.

Q. When was that?

A. That was during the time after the note expired, I believe, or before the note expired. I can’t tell you the definite date, but it was before——

Q. What year was it?

A. What year did I sign the note? When was the note due?

Q. Well, do you recall the year in which you

(Testimony of Joseph G. White.)

had this conversation with Mr. George [47] Wiener?

A. I imagine it would be around the time that the note was delinquent or expired, the time that the note had expired.

The Referee: I think that is immaterial, counsel. Obviously it was between the time the note was executed and the time the note was paid.

Q. (By Mr. Wellins): Now, in that conversation with Mr. Wiener was anything said by you and Mr. Wiener on the subject of the negotiations between the Trustee and Mr. Gibbons in reference to settling a claim of the Trustee against Mr. Gibbons? A. No.

Q. You knew, did you not, that the Trustee had filed a lawsuit against Mr. Gibbons to collect damages for usurious interest, among other things, did you not? Is that right? A. No, I didn't.

Q. Your attorneys never told you that?

A. No.

Q. You have heard Mr. Howard testify about his examination of certain files in the Federal Court pertaining to the Trustee's lawsuit, in August—against Mr. Gibbons, in August, 1948?

A. Yes.

Q. And isn't it true that you signed a cross-complaint in the promissory note action setting up the same usurious [48] interest statistical information as Mr. Howard obtained from the Federal Court file?

A. I could answer it in this way—I can't answer

(Testimony of Joseph G. White.)

that question intelligently because I wouldn't know what you——

Q. Mr. White, I show you what purports to be your signature on a verification of an Amended Answer, Proposed Amended Answer, filed August 12, 1948, and ask you—and bearing a notarization of August 12, 1948, and ask you if that is your signature? A. Yes, it is.

Q. And I call your attention to the photostats attached to this Amended Answer marked Exhibit "A." You saw them at the time you signed this paper, did you not?

A. I gave them to Mr. Howard.

Q. You gave them to Mr. Howard?

A. Yes.

Q. And you knew, did you not, that these papers came from the papers in the action filed by the Trustee against Mr. Gibbons?

A. I knew that they came from the Trustee's files?

Q. No, that isn't what I'm asking you. You knew that these photostats had been made of the papers that were on file with the Court in the Trustee's lawsuit against Mr. Gibbons?

A. Yes. Now, I'm not saying that I gave those photostats. [49] I gave these papers I think it was either to Mr. Howard or to you or to Mr. Callister, but these papers at one time were in my possession and I gave them to either you, Mr. Callister or Mr. Horowitz. Now, those photostats, I don't know any-

(Testimony of Joseph G. White.)

thing about them because I have never had any photostats made.

Mr. Horowitz: I think there is some confusion. When the witness refers to "these papers" he refers to the original and not the photostat which was given originally by Mr. White to the Trustee in Bankruptcy.

The Referee: All right.

Q. (By Mr. Wellins): Your testimony is that you gave the originals of the things of which these photostats are copies to Mr. who?

A. Either Mr. Callister or to you because you and Mr. Callister both asked me to get all the information I could get, all the papers I could get in regard to Al Herd's papers, that I had, and these happened to be some of the papers I had.

Q. And when did you have those papers? When did you get those papers?

A. Oh, I think that was when Al Herd first went into bankruptcy.

Mr. Wellins: I see. All right. Do you want to prove this by stipulation or do you want me to question the witness about it? [50]

Mr. Horowitz: Well, I think we can stipulate. It is a fact.

Mr. Wellins: I have here, Your Honor, the originals of the statistical information referred to by the witness.

Mr. Horowitz: That was prepared by an accountant. That is the one in evidence. We will stipulate that was prepared by an accountant for

(Testimony of Joseph G. White.)

Mr. White and given to the Trustee in Bankruptcy or to one of his attorneys.

The Referee: All right, Trustee's Exhibit 14.

Q. (By Mr. Wellins): Mr. White, referring to that Trustee's Exhibit 14 which has just been handed to the Judge, approximately when did you deliver that to Mr. Callister or to Mr. Weber or myself?

A. I would say the early stages of the Al Herd bankruptcy trial.

Q. Within the first month or two after Al Herd's bankruptcy was filed?

A. I think so, yes.

Q. A few moments ago Mr. Horowitz read a letter dated July 14th, addressed to you, from Mr. Callister. Did you receive that letter?

A. Yes, I did.

Mr. Wellins: May I see that, counsel?

Mr. Horowitz: Yes (handing document to counsel).

Q. (By Mr. Wellins): I show you this letter to help you refresh your recollection and ask you whether you were notified [51] on or about July 14, 1948, by Mr. Callister, that he had just been served with a notice of motion and affidavit and substitution of attorneys in the case of Gibbons vs. White? A. Did I receive that letter?

Q. Yes. A. Yes, I received that letter.

Q. All right, and the substitution of attorneys referred to there was the substitution of Mr. Weber and myself in the place of Jones & Wiener as at-

(Testimony of Joseph G. White.)

torneys for Mr. Gibbons; is that correct?

A. Yes, sir.

Q. Now, you had been examined by Mr. Weber and myself on 21-A examinations here in the bankruptcy court; is that correct? A. Yes.

Q. That was prior to the date of July 14, 1948?

A. Yes.

Q. And on July 14, 1948, you knew that Mr. Weber and I were the attorneys for Francis F. Quittner, the Trustee in the bankruptcy of Al Herd? A. Yes.

Q. You did not file a claim in the Al Herd bankruptcy, did you?

Mr. Horowitz: I object to that, if the Court please, on the ground it is not proper cross-examination and has no—— [52]

The Referee: Sustained. Proceed.

Q. (By Mr. Wellins): Were you present in the office of Mr. Fred Horowitz before the motion for summary judgment was heard in July or August of 1948, at a conversation in which Mr. Daniel Weber was also present? A. Yes.

Q. Now, Mr. White, did you ever examine any of the records or files of the Al Herd bankruptcy?

A. No, I haven't.

Q. You never have? A. No, sir.

Mr. Horowitz: Mr. Wellins, are you going to use that letter in evidence?

Mr. Wellins: No, I will return it to you. I just wanted it for a question. However, if you wish to have it in evidence I have no objection.

(Testimony of Joseph G. White.)

Mr. Horowitz: No. You asked for it and I produced it.

The Referee: Anything else?

Q. (By Mr. Wellins): Did you have a—referring now to the substitution of Mr. Fred Horowitz in the place and stead of Cannon & Callister, I call your attention to the fact that it has been stated that the written substitution was signed on August 4, 1948, and I ask whether it is a fact that Mr. Horowitz' office, Mr. Howard, was representing you some time prior to August 4, 1948, in connection with the [53] Gibbons promissory note action, before the formal substitution of attorneys was signed?

Mr. Horowitz: I don't quite understand that question.

The Referee: Do you understand the question?

The Witness: The only thing I could answer you, Mr. Wellins, would be I don't think Mr. Horowitz ever represented me legally while Mr. Callister was still my attorney. The reason Mr. Callister withdrew was on account of him being with the Morris Plan Bank. He couldn't represent us both. So that was my motive or Mr. Callister's motive in withdrawing. In other words, he couldn't represent me and the Morris Plan Bank at the same time when the Morris Plan Bank was suing me.

Q. (By Mr. Wellins): Mr. White, you remember that an appointment was made for you and Mr. Horowitz and myself to have a conference at Mr. Horowitz' office in or about the first week of July,

(Testimony of Joseph G. White.)

1948? A. Yes.

Q. And you remember that at the last moment some business prevented you from coming to that meeting and you did not attend?

A. I think so.

Q. You received this letter of July 14, 1948, from Mr. Callister, mentioning and enclosing a copy of substitution of attorneys, Mr. Weber and myself being substituted in the place of Jones & Wiener for Mr. Gibbons in that promissory [54] note action. Prior to receiving that letter from Mr. Callister did you know that Mr. Weber and I were acting as attorneys for Mr. Gibbons in the promissory note action?

A. Yes. I thought you were.

Q. I see. When did you first think that?

A. Well, I think at the last meeting I had with Mr. Wiener, Mr. Wiener told me that he was going to withdraw or not represent Mr. Gibbons because Mr. Gibbons and Al Herd was too much for him to cope with, and that he was just going to——

Q. Don't tell me what Mr. Wiener told you. I just want——

A. You asked me when I assumed that you were his attorney. That is when I assumed that you were his attorney; right after I think it was the time that I was summoned here for a meeting or something, I saw Mr. Gibbons sitting at your table there and you talking to Mr. Gibbons, and after what Mr. Wiener told me I thought that you were representing him.

(Testimony of Joseph G. White.)

Q. Now, in what month was that?

A. Oh, that I couldn't say. That was during the bankruptcy.

Q. Was it in 1948?

A. Well, it was during the Al Herd bankruptcy trial.

Q. Well, was it on the day that Mr. Gibbons testified on the 21-A examination during the bankruptcy hearing?

A. I don't recall whether he testified or not. I know [55] he was here, though.

Q. But it was at or about the time that he was testifying, is that correct, here, under the 21-A examination?

A. That I can't say. I can't say whether he testified or not. All I know is that Mr. Gibbons was present.

Q. All right, was it on one of the days you testified on 21-A examination?

A. I think it was on one of the days I was supposed to testify and they didn't call me but Mr. Callister asked me to be here.

Q. Well, in trying to fix the date now of this event of your knowledge of Mr. Weber and I appearing in this case representing Mr. Gibbons, it would be some time before your last testimony under 21-A examination; is that correct?

Mr. Horowitz: That is objected to on the ground it is immaterial. I don't know why we are taking so much time——

The Referee: Sustained. Proceed.

(Testimony of Joseph G. White.)

Q. (By Mr. Wellins): Now, when you first say you knew that Mr. Weber and I were representing Mr. Gibbons, you knew that we were at the same time representing Mr. Quittner, the Trustee in bankruptcy of Al Herd; is that correct?

A. Yes.

Q. And from the time you first acquired that knowledge up until and including the 14th day of December, 1948, when you paid out those two checks to me, you remained under that [56] same impression; is that correct?

A. That you were attorneys for Rusty Gibbons, for George Gibbons?

Q. As well as for the Trustee. A. Yes.

Q. Now, when did you first find out that the Trustee had compromised his claim with Mr. Gibbons? A. That the Trustee——

Q. Yes. Do you understand my question?

A. Yes. At no time did I ever know that.

Q. You had not known it until today when I just mentioned it to you? A. That is right.

Q. This is the first moment you have known it; is that right?

A. That is right. No, I shouldn't say just now. I knew it after it was brought to my attention in Mr. Howard's office. I shouldn't say just now, no.

Q. Well, when did Mr. Howard bring it to your attention in his office, Mr. White?

A. Well, when he explained to me—I think that was maybe a week or two after our trial, when I was tried in Judge Stephens' court.

(Testimony of Joseph G. White.)

Q. You are referring to the accounting and unlawful eviction suits in the Superior Court, Judge Stephens' court?

A. I don't know what it was. [57]

Q. All right.

A. Well, maybe a week or two weeks later, that is when Mr. Howard mentioned it to me, that I didn't actually pay that money to Rusty Gibbons, that the Referee in Bankruptcy got it.

Q. And that would be in about May of 1949?

A. Well, that was about a week or two after the trial in Judge Stephens' court.

Mr. Wellins: Very well. Is that correct, Mr. Horowitz, about May of 1949?

Mr. Horowitz: Yes, about May, the latter part of April or the early part of May, 1949.

Q. (By Mr. Wellins): Now, prior to that time you knew, did you not, that the Trustee had filed an attachment against you for the proceeds of the note, the Gibbons note? A. Yes, I did.

Q. When you spoke with Mr. Wiener, in the conversation you started to tell us about before regarding the representation of Mr. Gibbons, did you in that same conversation speak with him in connection with this settlement of the claim of Mr. Gibbons on the promissory note?

A. Yes, I did.

Q. In the conversation that was had in my office on the date of the signing of this receipt, do you remember that we talked about the fact that you were handing me a \$5,000.00 check drawn on the

(Testimony of Joseph G. White.)

American National Bank & Trust Company of [58]
Chicago? A. Yes.

Q. And you remember that we also talked about the fact that it would take a few days to clear that check because it was drawn on the Chicago bank?

A. That was a Cashier's Check I gave you.

Q. And do you remember we talked about the fact that even being a Cashier's Check it would take a day or two or three in order to have the check clear? Do you remember that?

A. No, I don't.

Q. Do you remember also that the other check you gave me was a check for \$1220.00?

A. Yes.

Q. That was drawn on the California Bank; is that right? A. Yes.

Q. And we talked about the fact it would take a day or two to clear that check?

Mr. Horowitz: I object to that as immaterial.

The Referee: Sustained. Let's get along, counsel. You are taking too much time.

Q. (By Mr. Wellins): Do you remember that there was discussion at that same meeting to the effect that a satisfaction of judgment would not be given by Mr. Gibbons and the Trustee until the checks had both cleared? [59] A. No.

Mr. Horowitz: We will object to that as immaterial.

The Court: Sustained, counsel.

Q. (By Mr. Wellins): Do you remember that this receipt was written because you desired some

(Testimony of Joseph G. White.)

written evidence of the delivery of the two checks to me at that date? Do you remember the discussion on that subject?

A. Mr. Wellins, I had no discussion with you whatsoever.

Q. I'm not talking about what you personally said. I am talking about what was said in your presence there.

A. You had no discussion with me, and the motive in giving you two Cashier's Checks—I could have given you a personal check, but that was the motive. I gave you two Cashier's Checks. That was supposed to be the same as cash.

Q. What I'm asking you is do you remember that being discussed?

Mr. Horowitz: We will object to that as immaterial.

The Referee: Sustained. Proceed.

Mr. Wellins: No further questions on this subject matter.

The Referee: Any further questions?

Mr. Howard: No, if Your Honor please.

The Referee: Any other witnesses?

Mr. Howard: No other witnesses, if the Court please.

The Referee: All right, any further evidence, counsel?

Mr. Wellins: Your Honor, I would like to be sworn as [60] a witness on behalf of the Trustee.

The Referee: All right, raise your hand and be sworn.

MARVIN WELLINS

called as a witness, being first duly sworn, testified as follows:

The Referee: All right, be seated and state your name in the record.

The Witness: Marvin Wellins.

Direct Examination

By Mr. Weber:

Q. Mr. Wellins, you are one of the attorneys for the Trustee in Bankruptcy in these proceedings? A. Yes.

Q. Do you recall a conversation with Mr. Fred Horowitz around July 1st of 1948, in which you discussed with him certain litigation in which Mr. White was a defendant? A. Yes.

Q. Where did that discussion take place?

A. In the office of Mr. Fred Horowitz at 325 W. 8th Street, Los Angeles.

Q. Was that conference had pursuant to a previous appointment?

A. There had been a telephone appointment made for that conference.

Q. Who called whom? [61]

A. I believe I called Mr. Horowitz.

Q. Tell us what was said.

A. I called Mr. Horowitz a few days prior to the conference and asked to make an appointment to speak with him on the subject of a full and final compromise of all litigation relating to Joseph G. White, the respondent here, including the promis-

(Testimony of Marvin Wellins.)

sory note action of Gibbons vs. White, the partnership accounting suit, and the unlawful eviction suit; and Mr. Horowitz stated that he would be willing to confer on that subject with me at his office, with Mr. White, and we made an appointment for a fixed date. I stated to Mr. Horowitz that by reason of a settlement made by the Trustee with Mr. Gibbons I was now in a position to compromise all three actions if we could get together on a figure.

Q. What else was said, if anything?

A. That is about the entire conversation as best I can recall it.

Q. Did you thereafter have a meeting with Mr. Horowitz?

A. Yes. I met with Mr. Horowitz at his office.

Q. Approximately when?

A. At the time arranged in our telephone discussion, which was a few days after the telephone discussion.

Q. Would this personal meeting be somewhere around July 1st, 1948?

A. Approximately the first week in July, 1948.

Q. Who were present? [62]

A. Just Mr. Horowitz and myself.

Q. What was said?

A. I said in substance to Mr. Horowitz that the Trustee would like to make a final disposition of these three lawsuits, the Gibbons against White, the accounting lawsuit, and the unlawful eviction lawsuit. Mr. Horowitz said that Mr. White was unavoidably prevented at the last moment from being

(Testimony of Marvin Wellins.)

present but that Mr. Horowitz would continue the conversation with me without Mr. White.

Mr. Horowitz asked me if I could give him a figure at which the three lawsuits could be settled. I said that if the Trustee could receive a total of \$20,000.00 that I would recommend to the Trustee that that sum be accepted in full and final disposition of the three lawsuits. Mr. Horowitz stated that that amount was entirely too high and that the amount he had in mind to offer was so much lower that without Mr. White being there he didn't want to make any statement on a figure, but that he would like to have further discussion on the subject of the compromise of the three law suits.

With that I left.

Q. Now, did this conversation take place prior to our service of the substitution of attorneys upon Cannon & Callister?

A. Yes. The service on Cannon & Callister of the substitution of attorneys, ourselves in the place of Jones & Wiener, [63] was made on or about July 14th or thereabouts, approximately two weeks after my first conversation with Mr. Horowitz.

Q. Now prior to this telephone conversation which you made to Mr. Horowitz, did there come a time when you had a discussion with Mr. Horowitz pertaining to our lending him the transcript of the 21-A proceedings?

A. Yes.

Q. Does this refresh your recollection—does this letter dated April 29, 1948, written by you to Mr. Horowitz, refresh your recollection as to the date

(Testimony of Marvin Wellins.)

upon which the transcript of the 21-A proceedings was delivered to Mr. Horowitz? A. 1948, yes.

Mr. Horowitz: We will stipulate it was delivered on or about the date mentioned there. That is a partial transcript. You didn't have it all at that time.

The Referee: Counsel, why do we insist on going over and over those same things? That is all in here. You are just encumbering the record.

Mr. Weber: I didn't remember whether the record showed the date.

Q. And the completed transcript was delivered on or about May 12, 1948?

Mr. Horowitz: I will so stipulate.

Mr. Weber: And the entire transcript was returned [64] June 10, 1948?

Mr. Horowitz: I will so stipulate.

The Referee: All right, cross-examine.

Cross-Examination

By Mr. Horowitz:

Q. Mr. Wellins, do I understand that in this conversation that you were supposed to have had with me on or about July 1st or during the first week in July of 1948 that I discussed with you the matter of the suit of Gibbons vs. White?

A. Yes.

Mr. Horowitz: That is all.

The Referee: Any further questions?

Mr. Weber: No further questions.

The Referee: Step down. Any other evidence on this side? Are you through now, Mr. Weber?

Mr. Weber: No, I would like to be sworn as a witness for the Trustee.

The Referee: I never saw a lawsuit like this where the only witnesses are lawyers.

DANIEL A. WEBER

called as a witness, being first duly sworn, testified as follows:

The Referee: Be seated and state your name in the record. [65]

The Witness: Daniel A. Weber.

The Referee: All right; proceed.

Direct Examination

By Mr. Wellins:

Q. You are one of the attorneys for the Trustee herein? A. I am.

Q. Did you have a conversation with Mr. Fred Horowitz in the year 1948? A. Yes.

Q. Where did that conversation take place?

A. In the office of Mr. Horowitz.

Q. And what was the date of that conversation?

A. The first of two of them took place July 28, 1948.

Q. Referring to the first of those conversations, who was present?

A. Mr. Horowitz and myself.

(Testimony of Daniel A. Weber.)

Q. And what was the substance of the conversation?

A. Mr. Horowitz said he would like to know whether or not the three pending actions, namely, Quittner vs. White, Quittner vs. Rosen, Rosen and White, and Gibbons vs. White, could be settled on a lump sum deal, and said he would recommend to Mr. White that Mr. White pay the Trustee \$5,000.00, the amount of the note, using that language, the amount of the note, in full settlement of the three actions. I said to Mr. Horowitz I could hardly recommend to the Trustee that he [66] go for that kind of a deal since I felt we had a good chance to get a summary judgment granted on the promissory note alone.

That was the substance of the conversation insofar as it dealt with this subject matter. There was some discussion by Mr. Horowitz about other litigation he had in the office, I think involving a man named Nebenzol. There was a reference to an attorney by the name of Mellinkoff.

The Referee: I think that is all immaterial. Go ahead.

Q. (By Mr. Wellins): Did you have another conversation with Mr. Horowitz at a later date?

A. I spoke to Mr. Horowitz on August 13th at his office, after receiving a telephone call a day or two earlier from Mr. Howard. I had a conversation with Mr. Howard on the telephone.

Q. Who was present at the second conversation?

A. Mr. White and Mr. Horowitz and myself, and

(Testimony of Daniel A. Weber.)

Mr. Howard was in and out of the room. I don't know whether or not he was there for the full length of the meeting, which wasn't too long.

Q. What was the substance of the conversation?

A. Mr. Horowitz said, "We would like to settle these three actions at one fell swoop," and he would recommend to Mr. White that Mr. White pay in addition to the \$5,000.00, the principal amount of the promissory note—"Well, we will see to it that you can get something in the way of attorney's [67] fees; the note says something about attorney's fees." And to use Mr. Howard's phrase, which was quite correct, I turned on my heel and left in a huff with the words, "That is practically a restatement of what you offered me last time when I was here and you got me down from Beverly Hills for this," and I walked out. On the way out I was served by Mr. Howard who called me, asked me to wait a moment, he had some papers to serve, and it was on my way out of the room, out of the office, that he handed me the Amended Answer and Cross-Complaint in the action entitled Gibbons vs. White and I gave him a receipt.

Mr. Wellins: I believe that is all. No further questions.

The Referee: Just one moment. I show you Trustee's Exhibit 9, which I think is a photostat of the record in the case of Gibbons vs. White, is it?

A. That is correct.

Q. What is the instrument that was served on you on the day you just mentioned in your testimony?

(Testimony of Daniel A. Weber.)

A. There were three documents served on me contemporaneously.

Q. Well, will you find it in the record there?

A. The papers served on me that day are not among those photostated here, Your Honor.

Q. Then the exhibit you are now examining is not a complete record of the case, is that it? [68]

A. It is not.

The Referee: All right. Cross-examine.

Mr. Howard: No questions.

The Referee: All right, step down.

Mr. Wellins: Does Your Honor wish to have the witness point it out? We have the original file in the case.

The Referee: No, I just wanted to see if it was in evidence here. It isn't in evidence. That is all right. Step down.

Have you any other witnesses, Mr. Wellins? Are you all through now?

Mr. Wellins: If the Court please, we will offer by reference, in order to complete the file, the documents served on Mr. Weber that day, namely, the Proposed Cross-Complaint, the Proposed Amended Answer, and the Notice of Motion and Motion for Leave to File Amended Answer and Cross-Complaint, and Points and Authorities in support thereof, all in the case of Gibbons vs. White, case No. 533306.

The Referee: I don't think it is necessary to encumber the record if it is stipulated those papers were so served that day.

Mr. Horowitz: We will so stipulate.

The Referee: Anything more?

Mr. Wellins: It might have another bearing on the issues on the subject of *res judicata*, in addition to the identification of the records, Your [69] Honor.

The Referee: Counsel I can't accept anything by reference from anybody's file but my own.

All right. Any other witnesses?

Mr. Wellins: Well, may we in line with the stipulation that we had at the earlier hearing have a number reserved for these documents and supply the photostats to the Court?

The Referee: If there is no objection you may furnish photostats of the instruments in question. If, as, and when they are received they will be marked as the Trustee's exhibits then next in order. Any objection?

Mr. Horowitz: No, no objection.

The Referee: All right. Anything further now?

Mr. Wellins: Not on this side, Your Honor.

The Referee: All right, gentlemen, is there anything further?

Mr. Howard: May we put Mr. Horowitz on the stand, Your Honor?

The Referee: All right. We might as well have them all.

FRED HOROWITZ

called as a witness, being first duly sworn, testified as follows:

Mr. Wellins: Your Honor, I would like to correct a statement I just made. We have two further witnesses who will be able to testify on the subject relating to *res judicata*—— [70]

The Referee: This is the time for the trial, counsel.

Mr. Wellins: They are both attorneys, Your Honor, and they are both engaged in trial this afternoon.

The Referee: I'm sorry, counsel. The matter is ruled on. All right, proceed.

Mr. Wellins: I realize the ruling, Your Honor. I am stating this with the utmost respect to the Court's ruling.

The Referee: I'm sorry. We are going forward.

Direct Examination

By Mr. Howard:

Q. Mr. Horowitz, when did you first find out about the action Mr. Gibbons had commenced against Mr. White?

A. A few days after July 14th, 1948, and that was the first time I ever heard of the existence of such action.

Q. And did either Mr. Wellins or Mr. Weber advise you at any time that they had settled with Mr. Gibbons so that they were then the owners of

(Testimony of Fred Horowitz.)

the claim that Mr. Gibbons was urging against Mr. White? A. Never at any time.

Q. Did they ever tell you that they had settled or compromised that claim in any way?

A. Never at any time.

Q. Do you recall the conversation that was referred to [71] by Mr. Wellins of July 1, 1948, held in your office? A. Yes.

Q. Would you relate that conversation?

A. Well, I would like to say in connection with that that there was no conversation or discussion of the case of Gibbons vs. White. As I said before, the first time I ever knew of the existence of that suit was subsequent to July 14, 1948, and I did not at any time prior to that time discuss with Mr. Wellins the settlement of a suit in which I was not attorney and which I did not know the existence of. I did discuss with Mr. Wellins the litigation, or the conversation with Mr. Wellins was concerning the litigation against Mr. White. I told Mr. Wellins that Mr. White had been imposed upon, that because Mr. Herd had defrauded Mr. White's brother-in-law Mr. White had foolishly signed a note to the Morris Plan Bank for \$25,000.00 and had put up his orange grove for security for that, that he had also signed a note of \$5,000.00 to a Mr. Gibbons, that he had also let Mr. Herd have other monies, and Mr. White was being punished for trying to be a decent individual, and that I thought this proceeding was as wrong as could be and the action should not proceed.

(Testimony of Fred Horowitz.)

At the second conversation when Mr. Wellins came in, he told me he was in a very generous mood, that he had settled some litigation and since he had settled some litigation he thought that this litigation of White ought to be settled. I told him—I asked him what he had in mind and he said he [72] had in mind some \$20,000.00, and I said that Mr. White had been hurt enough, had been hurt bad enough, and that to pay that much more money would simply be to bankrupt him, and if Mr. White lost the litigation he would be bankrupt but that was a risk Mr. White would have to take.

At the second conversation I said as far as the Gibbons note is concerned I thought it was too bad but apparently we would have to pay that note to Mr. Gibbons, and I offered to pay the amount of that note and some attorney fees. That was rejected, and I said I wouldn't pay anything in connection with the Quittner suit against Mr. White.

Q. When did you first find out that the Trustee had acquired an interest as owner of the Gibbons action or note?

Mr. Wellins: I object to that assuming facts not in evidence, contrary to the evidence. The assignment of the proceeds is in evidence, and the question is contrary to the evidence.

The Referee: Well, let's not quibble about that now. Perhaps counsel can rephrase the question.

Mr. Howard: I will rephrase the question.

Q. When did you first find out that Mr. Gibbons had made a compromise with the Trustee

(Testimony of Fred Horowitz.)

whereby the Trustee acquired some interest in the Gibbons note or the proceeds thereof?

Mr. Wellins: I object to the form of the question because the words "in the Gibbons note" again assume facts not [73] in evidence and contrary to the evidence.

Mr. Howard: I will rephrase my question again.

Q. When did you first find out about the settlement between the Trustee and Mr. Gibbons?

A. During the pendency of the litigation of the Trustee against Mr. White that we tried those many days before Judge Stephens.

Q. And with reference to the trial of the action, was it before or after or during the trial?

A. It was during the trial of the action.

Mr. Howard: No further questions.

The Referee: Cross-examine.

Cross-Examination

By Mr. Wellins:

Q. When was the second conversation that you state that you had with me?

A. I can't recall it by date, Mr. Wellins.

Q. Well, what month? What month was it in?

A. I just can't recall the date. I would just be guessing.

Q. In any event, it was after you had knowledge of the suit between Mr. Gibbons and Mr. White?

A. Yes. That I am sure of.

Q. And was it before or after you had become Mr. White's attorney in that suit? [74]

(Testimony of Fred Horowitz.)

A. Well, it was after I had become Mr. White's attorney in that suit. I am sure of that.

Q. And what was the \$20,000.00 to be for, Mr. Horowitz?

A. Well, what you wanted the \$20,000.00 for, as I understood it then, was to settle the litigation of Quittner vs. White. That is the partnership suit. The discussion with reference to the unlawful detainer suit, that was just in the discard. There was hardly a word of discussion about that at all, about that suit. It wasn't worthy of a suit.

Q. What did you understand—withdraw that. This \$20,000.00 was to be given, was it not, for a dismissal of—strike that. This \$20,000.00 was to be given in full settlement of the three pieces of litigation, the Gibbons vs. White suit, the partnership accounting suit, and the eviction suit; is that correct?

A. Well, I don't know that I can answer it quite that way. You were urging me to induce Mr. White to make a settlement, and you said that \$20,000.00 would settle it. I imagine that the \$20,000.00 would have more than settled it because we didn't intend to pay anything like \$20,000.00.

Q. I'm not concerned with the amount. I am concerned with what it was for. What was the \$20,000.00 to be settlement for as I requested it?

A. As I understood it, that was for the Quittner vs. White only. Our principal discussion always was in connection with Quittner vs. White. It wasn't Gibbons vs. White. [75]

(Testimony of Fred Horowitz.)

Q. Now, Mr. Horowitz, did you know at that time that Mr. Weber and I had been substituted as attorneys for Mr. Gibbons in the Gibbons vs. White lawsuit?

A. Well, the second time I talked to you—and when I say the second time, I might have talked to you some other times in between or before or after, I don't recall which, but surely after I was substituted as attorney in the place and stead of Cannon & Callister the files showed that you had been substituted as attorneys for Mr. Gibbons.

Q. Isn't it rather correct, Mr. Horowitz, that your formal substitution in the place of Cannon & Callister took place on August 4, 1948?

A. That is right.

Q. And isn't it correct that you and I had this conversation which you refer to as the second conversation quite a good deal prior to August 4, 1948, probably a month or so prior to that? Isn't that correct?

A. Oh, we had conversation before I knew of the existence of the litigation of Gibbons vs. White, certainly, but I never, Mr. Wellins, talked to you about a lawsuit in which I was not attorney of record or attorney in fact.

Q. As a matter of fact, Mr. Wellins, this so-called second conversation that you testified on direct examination that you had with me was held on or about the first week of July of 1948; is that correct?

A. Oh, no, no, no. [76]

Q. And as a matter of fact you and I had only

(Testimony of Fred Herowitz.)

one discussion and not two discussions on the settlement of these three matters?

A. Oh, I would say more than two; not only two, I would say more than two.

The Referee: Are you confused in these conversations that—are you confusing any of the conversations that you say were had with Mr. Wellins with any conversations you had with Mr. Weber?

A. Well, Judge, I consider them both at the same time. I talked to Mr. Weber a less number of times than I talked to Mr. Wellins.

The Referee: I see. All right.

A. I talked to—Mr. Weber was out in Beverly Hills and I was downtown and Mr. Wellins was downtown.

Q. (By Mr. Wellins): Isn't it rather correct, Mr. Horowitz, that you spoke to me on the first of the discussions regarding this compromise and settlement, and you spoke to Mr. Weber in your office on the second and third conversations, all of which were held at your office?

A. Every conversation was held at my office. I never went to your office at any time to have any discussion. So all of them took place in my office.

Q. And there were three, weren't there?

A. I would say there were more than three.

Q. You would? [77] A. Yes.

Q. Do you have any dates?

A. I don't, but I will say this, it is an utter impossibility for me to have discussed and the fact is that I did not discuss the settlement of Gibbons

(Testimony of Fred Horowitz.)

vs. White, and couldn't have, prior to a few days after July 14, 1948.

Q. Mr. Horowitz, did you ever make any examination of the bankruptcy files in the matter of Al Herd, bankrupt?

A. After this proceeding was started and one time when we were waiting I looked at the file here.

Q. When you say "this proceeding," you mean the hearing on this order to show cause?

A. Yes.

Q. But prior to that time you had never made any examination of the bankruptcy file?

A. No.

Q. When did you first learn that Mr. Weber and I were attorneys for the Trustee in Bankruptcy of Al Herd, bankrupt?

A. Well, I was representing Mr. White in that litigation. I knew you were attorneys in that litigation.

Q. Well, may we fix a date for that?

A. Give me the—may I have my file of Quittner vs. White?

The Referee: Can't we shorten it? It was long before judgment was secured against Mr. White in the Gibbons suit?

The Witness: Oh, yes. [78]

The Referee: I think that covers it.

Mr. Wellins: Yes, that will be sufficient.

The Referee: Go ahead.

Q. (By Mr. Wellins): And it was also long before these two conferences or conversations you

(Testimony of Fred Horowitz.)

mentioned regarding a compromise of these matters?

A. It was shortly after the first transcripts were received because I recall telling Mr. Weber I would appreciate an opportunity to examine the transcript to see what the case was all about.

Q. That is right. That would be in about March of 1948; is that correct?

A. That would be right.

Q. Very well. At that time—strike that. And when did you first find out that we were also representing Mr. Gibbons?

A. I found out about that shortly after July 14, 1948.

Q. I see. And did you see the form of receipt which is Trustee's Exhibit No. 11 here?

A. Actually I didn't. I told Mr. Howard to take care of the matter. I assumed that he did, and I paid no further attention to it.

Q. I see. Did you know in July of 1948—strike that. Did you know in August of 1948 that the Trustee was suing Mr. Gibbons for damages for usurious interest, among other things? [79]

A. Well, now, when it comes to a precise date I can't say, but some place in all of this maze of litigation that Mr. White found himself in I was informed that there was some suit on the part of Mr. Gibbons—against Mr. Gibbons by the Trustee, and I thought it had to do with usury. Now, somebody told me it had to do with usury although I never have seen that petition up to this moment. I have never seen that complaint.

(Testimony of Fred Horowitz.)

Q. Well, I call your attention to the fact that your office as attorneys for Mr. White filed the Proposed Amended Answer in the Gibbons vs. White case on August 16, 1948, it having been sworn to by Mr. White on August 12, 1948, in which the statistical information identical with that used by the Trustee in the Federal Court action against Mr. Gibbons for usurious interest was used, and ask you whether or not it is a fact that you knew on or about August 12, 1948, about the pendency of the Trustee's suit against Mr. Gibbons in the Federal Court?

A. I was informed by Mr. White that an accountant who had worked on his behalf had prepared some papers which showed the commission of usury by Mr. Gibbons, and Mr. White stated that it had been given in the Bankruptcy Court, and Mr. Howard did what had to be done thereafter to get a copy of it.

Q. Now, you mentioned that I told you that I had settled some litigation. Was what I told you that the Trustee [80] has compromised his claim with Mr. Gibbons?

A. No.

Q. Isn't it a fact that you knew at the time of the second conversation about which you have testified on your direct examination that Mr. Weber and I were speaking to you with a view toward the settlement of three pieces of litigation, the Gibbons suit and the two suits by the Trustee against Joseph G. White?

A. You see, at the time I had the conversation

(Testimony of Fred Horowitz.)

a summary judgment had not been granted. I wanted to settle that suit and I said I would pay a certain sum in connection with that suit. I also—and that was in your capacity as attorney for Mr. Gibbons. I also told you at that time I would like and would want the other litigation disposed of and as to the other litigation I didn't propose to pay anything, and never at any time did I offer to pay as much as one cent for the disposition of the other litigation, and I told you that I couldn't afford to because if we accepted—if we assumed any liability then we would have difficulty because there had been some liens for—some liens by the Franchise Tax Commissioner or some other state agency, I don't recall the name now, for some \$17,000.00 against Mr. White, and I wouldn't pay you anything on that under any consideration.

Q. Isn't it true that you told me that whatever sum you would pay, \$5,000.00 that you mentioned in your direct testimony [81] with regard to that second conversation, was to be—was being paid or would be paid only on condition that all matters of litigation, including the Gibbons note and the other two lawsuits, were settled at that time?

A. Well, it just didn't get that far. I had a brief conversation with you, and then when Mr. Weber came in the conversation was even more brief because when I said I would only pay the \$5,000.00 and attorney fees on the Gibbons note and would pay nothing on the other, Mr. Weber turned

(Testimony of Fred Horowitz.)

on his heel and he left the office in a huff and that ended the conversation, which was very brief.

The Referee: Anything else?

Q. (By Mr. Wellins): Did you condition whatever offer you made to Mr. Weber upon the dismissal with prejudice of the cases of Quittner vs. White on the partnership accounting, the Quittner vs. Rosen and White on the unlawful eviction——

A. No, I just didn't have time, if I had wanted to put some conditions, because when I had suggested paying him nothing on the Quittner suits he left in a huff. I wouldn't discuss it with him after that under any condition.

Q. Did you hear Mr. Howard testify on that subject? A. Well, I am now testifying.

Mr. Wellins: That is all.

The Referee: Any other evidence?

Mr. Howard: That is all.

The Referee: Are you all through?

Mr. Wellins: We only have the two witnesses I mentioned [82] before, both attorneys and both in trial and I cannot produce them this afternoon, Your Honor.

The Referee: All right, no other evidence available at this time. All right, the Court holds that the first separate and distinct defense is not well taken. The second separate and distinct defense——

Mr. Wellins: Will the Court hear argument on that?

The Referee: No, I don't care to have any argument.

"The Trustee incorporates herein by reference each and every allegation contained in the first separate and distinct defense herein set forth."

Paragraph II: "Thereafter and on or about December 17, 1948, respondent White, who was the defendant and judgment debtor in said promissory note action, paid the sum of \$6220.00 in full satisfaction and discharge of said judgment.

"By reason thereof, respondent White is estopped and precluded from making any attack upon said judgment," etc.

Any further evidence on that, Mr. Wellins?

Mr. Wellins: May we understand which of these paragraphs are admitted by the parties as we did on the first defense, Your Honor?

The Referee: I think Paragraph II is admitted, is it not, gentlemen?

Mr. Howard: Yes, if the Court please.

The Referee: All right, Paragraph III is a conclusion [83] of law. Any further evidence? Naturally, gentlemen, all the evidence applies to all phases of this case. It doesn't have to be repeated on each separate phase of the case.

Mr. Howard: Surely.

Mr. Wellins: We have the same two witnesses, Your Honor, to offer testimony. I think their testimony will probably be relevant to this second affirmative defense as well.

The Referee: Your haven't them available now?

Mr. Wellins: No, Your Honor. Unfortunately they are both engaged in trial this afternoon.

The Referee: All right, the second separate and

distinct defense is not well taken.

The third separate and distinct defense, Paragraph II:

“At the time respondent White paid, satisfied and discharged said judgment as aforesaid, he knew that the proceeds of said judgment inured and belonged to, and had been assigned by Gibbons to the Trustee in Bankruptcy herein.”

Obviously they will not stipulate to that.

Mr. Howard: No.

The Referee: Do you have any further evidence?

Mr. Wellins: The same two witnesses, Your Honor, will testify to matters relevant to that issue.

The Referee: All right, the Court holds that the third separate and distinct defense is not well taken.

We will take the recess at this time.

(Recess) [84]

The Referee: All right, gentlemen, let's proceed to the fourth separate and distinct defense, and this concerns action No. 542,157 wherein the Trustee sued the respondent White. I assume the allegations of Paragraph I are admitted?

Mr. Howard: Except in one respect, if the Court please. The allegation is that the action was filed for an accounting by the defendant of all matters and transactions between the bankrupt and the respondent. The action was not filed for an accounting in respect to all matters and transactions between the bankrupt and the respondent but only an ac-

counting on account of a dissolution of partnership which it was alleged existed.

The Referee: Well, now, let's see what we have got in evidence on that.

Mr. Wellins: I might say the language of the paragraph is more limited than you indicated, counsel. It says all matters and transactions between the bankrupt and the respondent in respect to the bankrupt's business conducted at 7077 Sunset Boulevard, Los Angeles, California.

The Referee: Well, I find that we have Trustee's Exhibit 10 here, being a portion of the record in the case in question, but apparently it does not include the complaint.

Mr. Horowitz: May we offer the complaint in evidence, as to the contents of it, and we will have the photostat ordered on that.

Mr. Weber: Is the answer in the record, Your Honor? [85]

The Referee: Well, here is what we have as part of Exhibit 10: Answer of Defendants Joseph G. White and FilmLand Motors; Memorandum for Setting for Trial; Copy of Minute Order; Findings of Fact and Conclusions of Law; Judgment; Notice of Trial; and Notice of Entry of Judgment; and that is all, apparently.

Mr. Horowitz: I see. All right. Then we will offer the complaint so we will have a complete record, Your Honor.

Mr. Weber: I may have an extra copy. I'm searching for it now.

The Referee: Well, if you have we will put it in right now.

Mr. Horowitz: This is a copy. That will be fine. We don't have to have a photostatic copy of it.

The Referee: All right. This appears to be White's Exhibit No. 2. All right, it will be marked White's Exhibit 2.

Now then, the allegation as to what the suit was for becomes immaterial because the complaint itself is in evidence.

All right, that disposes of Paragraph I.

Paragraph II I think is immaterial because it seeks to describe the action. That is all Paragraph II is, isn't it, Mr. Wellins?

Mr. Wellins: That is correct, your Honor.

The Referee: Well, we have got the complaint here so [86] that tells us what the action is.

Paragraph III, on April 12 the respondent filed his answer. Said action was thereupon duly litigated and final judgment entered therein on May 16th in favor of Respondent White. Well, we have that in evidence. In other words, the judgment, whatever it is, and the findings, are here.

Paragraph IV:

"The alleged indebtedness of the bankrupt to respondent White asserted in the respondent's amended answer here, arose out of the transactions directly involved in said accounting action; and that the claim or counterclaims of respondent White asserted herein arose out of the transactions set forth in the complaint in said accounting action as the foundation of the plaintiff's claim in said action."

Well, again that is simply counsel's view of what

the situation is, and we have the papers here.

Paragraph V:

“At no time in said action did the respondent, either in his pleading or during the trial or at any other time, assert any claim, counterclaim or cross-complaint against the bankrupt or the Trustee in Bankruptcy herein.”

Well, so far as written pleadings or claims are concerned, we have the record, and I assume that is what is meant by Paragraph V. Is that right, Mr. Wellins?

Mr. Wellins: Yes, Your Honor.

The Referee: All right, Paragraph VI: [87]

“By reason of the premises, the respondent is estopped and precluded under and by virtue of Section 439 of the code of Civil Procedure of the State of California, from maintaining any proceeding upon, or asserting or claiming any indebtedness, offsets or counterclaims alleged in the respondent's amended answer herein.”

Well, suppose we get down to the meat of it now and let me see if I can find out what the complaint is about.

The caption of the complaint, which of course means very little, is “Complaint (Action for Partnership Accounting).”

Well, Paragraph X of the complaint alleges that the bankrupt Herd and White entered into an oral agreement of partnership. Then Paragraph XI says that in the month of May, 1947, the bankrupt and White orally modified and supplemented said agreement of partnership.

Paragraph XII, that they conducted the partnership business; Paragraph XIII, that in the month of July, 1947, White excluded the bankrupt from further participation in the business, etc., and took sole possession of the premises and the personal property.

Paragraph XIV, that White repudiated the partnership.

Paragraph XV, defendant White thereupon caused a corporation to be organized.

Paragraph XVI, that subsequent to his taking exclusive possession defendant White wrongfully did induce said sublessor to declare the lease cancelled, etc. [88]

Paragraph XVIII, that at divers times in and during the month of July, 1947, defendant White wrongfully took and converted to his own use certain funds, checks and instruments for the payment of money belonging to said partnership.

Paragraph XIX, that White either directly or through the corporation mentioned continued in possession of the demised premises and continued to operate the business.

Paragraph XX, that the bankrupt personally paid certain employees.

Paragraph XXII, that White has failed and neglected to contribute to the partnership his agreed capital contribution.

Paragraph XXV, that by reason of the aforesaid acts and conducts of defendants White and of Angel Motors (Filmland Motors), the business and good-will of said partnership have been totally destroyed, and the bankrupt's right, title and interest

therein have been rendered entirely valueless; by reason thereof, the bankrupt has been damaged in the sum of \$50,000.00.

Paragraph XXVII, that defendant White has failed to render to the bankrupt or plaintiff any accounting of his acts and conduct subsequent to his taking of possession of said demised premises, and his operation of said business, despite due demand therefor.

Wherefore, plaintiff prays judgment:

(a) dissolving said partnership; [89]

(b) requiring defendant White to account for all acts, transactions, matters and happenings pertaining to and arising out of said partnership;

(c) requiring defendant White to make contribution in accordance with Section 2434 (d) and (e) of the Civil Code, and also of the unpaid capital contribution referred to in Paragraph XXII hereof;

(d) requiring defendant White to reimburse plaintiff to the extent of one-half of the amounts personally paid by the bankrupt on account of partnership liabilities, as alleged in Paragraphs XX and XXI hereof;

(e) requiring defendant White to account for the funds, checks and instruments for the payment of money and other property belonging to the partnership and taken and converted by him to his own use, or received by him;

(f) requiring defendant White to account for the profits, gains, issues and emoluments resulting

from his wrongful procurement of the White lease to his nominee, to wit, Angel Motors (Filmland Motors) and his wrongful operation of the business upon the demised premises for his own benefit;

(g) adjudging that the right, title and interest of defendants White and Angel Motors (Filmland Motors) or either of them, in and to the White lease and any renewals or extensions thereof, and in and to the demised premises, be held for the benefit of said partnership; [90]

(h) directing the sale of all partnership assets and the distribution of the proceeds to partnership creditors in payment of their claims;

(i) enjoining the defendants from making or suffering any transfer or other disposition of partnership assets, directly or indirectly;

(j) appointing a receiver pendente lite, and to carry out the provisions of the final judgment and decree to be entered herein;

(k) appointing a referee to take and state the account of said partners;

(l) adjudging that plaintiff recover of defendants White and Filmland Motors the sum of \$50,000.00 as damages.

Now, what do the findings say? We have those in Trustee's Exhibit 10.

Paragraph IV of the Findings finds that it is not true that during the month of May, 1947, or at any other time or at all, the bankrupt and the defendant White entered into any oral agreement of partnership of any nature whatsoever.

Paragraph VIII of the Findings, it is not true that there existed any partnership agreement between the defendant White and the bankrupt.

Paragraph XIV, it is true that defendant White hasn't paid any of the debts of the bankrupt. It is true that the defendant White did not contribute to any alleged partnership in the sum of \$65,000.00 or any part thereof. It is not true [91] that the defendant White agreed to contribute to any partnership as agreed capital contribution, or otherwise, the sum of \$65,000.00, or any part thereof, or any other sum.

Paragraph XV of the Findings, it is true that at the date of the filing of bankruptcy against the bankrupt, to wit August 6, 1947, there existed debts and liabilities of the bankrupt in excess of \$50,000.00. It is not true that said debts were partnership debts.

Paragraph XVI, it is not true that there was any partnership agreement, written or oral, between the bankrupt and the defendant White.

The Conclusions of Law simply are that the plaintiff is entitled to take nothing against the defendants or either of them. The defendants are entitled to a judgment against plaintiffs and each of them for their costs and disbursements herein; and that is the judgment.

Now, your contention is that by virtue of Section 439 of the Code of Civil Procedure the respondent White here should have asserted the claim which he makes here as a defense or a counterclaim or by way of cross-complaint in what you call the accounting action. Is that it?

Mr. Wellins: Yes, Your Honor.

The Referee: All right. Do you have Section 439 here? I will get it.

All right, here is Section 439:

“If the defendant omits to set up a counterclaim upon [92] a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff’s claim, neither he nor his assignee can afterwards maintain action against the plaintiff thereon.”

Well, now, let’s see what it is that Mr. White asserts here in his amended answer to the order to show cause.

On May 1, 1947, Mr. Gibbons commenced legal action and attached the bankrupt on account of money loaned. On or about May 19, 1947, White as a gratuitous accommodation to the bankrupt gave Gibbons his promissory note in the sum of \$5,000.00 in consideration of which the aforesaid attachment was released. On August 12, 1947, Gibbons commenced an action in the Superior Court in and for the County of Los Angeles entitled Gibbons vs. White. Said action was to collect the aforesaid promissory note. On or about December 24, 1947, the Trustee herein commenced an action in the United States District Court against the aforesaid

Gibbons claiming that Gibbons charged the bankrupt usurious rates of interest and that Gibbons secured an unlawful preference when he received the said White note for the sum of \$5,000.00. In connection with said action the Trustee caused White to be served with garnishment. During the month of June, 1948, the Trustee compromised and settled that action against Gibbons. Said settlement among other things provided that the said note in the sum of \$5,000.00 would be the property of the Trustee; that at the time of making said [93] settlement with Gibbons the Trustee's attorneys were aware that if White knew the Trustee had become the real party in interest in the said action originally commenced by Gibbons against White, that White would be able to assert offsets and defenses which were available to him against the Trustee but not against Gibbons; that the aforesaid note of White to Gibbons in the sum of \$5,000.00 was executed by White as an accommodation for Herd. White received no consideration for its execution. In addition to the execution of said note, White also executed a note in favor of Morris Plan Bank of California in the sum of \$25,000.00 as an accommodation for the bankrupt. As evidence of his obligation to White under the aforesaid two accommodation notes, the bankrupt gave White his note in the sum of \$30,000.00, no part of which has been paid.

All right. Now, Mr. Wellins and Mr. Weber, why do you say that the action which Mr. White here asserts and brings against the Trustee arises out

of the transaction set forth in the complaint as the foundation of the plaintiff's claim in the case of Quittner vs. White?

Mr. Wellins: I think in answer to that we should put in some more evidence in support of the contention of the Trustee.

The Referee: No, we are through with the evidence.

Mr. Wellins: We haven't been asked if we have any on this defense. [94]

The Referee: I don't see where any evidence is needed.

Mr. Wellins: Then I guess we had better make an offer of proof.

The Referee: What do you want to prove?

Mr. Wellins: We want to prove to the Court that the transaction was—what the transaction was in that lawsuit. Your Honor has read Paragraph V of Mr. White's Amended Reply here. He refers in that to a \$5,000.00 note and a \$25,000.00 note and a \$30,000.00 note. The \$30,000.00 note was from Herd to White, and the \$5,000.00 note was from White to Gibbons, and the \$25,000.00 note was from White to the Morris Plan Bank. Now, those were the transactions which were in evidence and which were in litigation in the partnership accounting suit.

Going on from there a moment, we have further documentary evidence and evidence which we will produce through Mr. White as to what the nature of the transaction was as set forth in the complaint and as brought forth in the testimony in that state court action, to show that this claim of Mr. White

here is based entirely upon this \$30,000.00 note that Mr. Herd gave to Mr. White, which was completely litigated, which was completely discussed, in the litigation on the accounting suit, and in which Mr. White filed no counterclaim. That \$30,000 note was in evidence. So was the \$5,000.00 note and the \$25,000.00 note. That was the financing transaction that was at the heart of the Trustee's [95] contention on the partnership. Mr. White came in to lend money to various people or advance money to various people in order to assist Mr. Herd in his financial difficulties. The Trustee contended that Mr. White did it in accordance with a partnership with Mr. Herd. The Court said that there was no partnership, but the evidence was all concerning these transactions that are described both in the complaint and referred to in this Paragraph V of the Amended Answer of Mr. White.

The Referee: Well, let's see what further documentary evidence you have.

Mr. Wellins: Yes, Your Honor.

Mr. Howard: If the Court please, I might make a preliminary objection to the introduction of evidence that might save time, if I might do it at this time.

The Referee: Yes.

Mr. Howard: Counsel has said he intends to introduce evidence to show the nature of the transaction between Mr. Herd and Mr. White, which was litigated in the action of Quittner vs. White. If the Court please, the issues in that case are now finally determined and binding on us in this hearing here.

It was determined at that time that the transaction which formed the foundation and basis of their claim was an alleged partnership agreement. That was the foundation of their claim. It has been decided in a fashion which is now binding upon us that there was no such transaction. [96] So it seems to me that there cannot now be evidence that any other claim arose out of that transaction because it has been finally determined that there was no such transaction.

The Referee: Well, that is why I just took it for granted there could be no further evidence here. We have got all the evidence. We have the complaint and the answer and the findings and the judgment.

Mr. Wellins: That is true but of course we don't plead the evidence when we draw the complaint, and the evidence is what is the transaction involved, and what counsel has said is only correct to the limited extent——

The Referee: Well, here is the section you rely on:

“If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint”——

Mr. Wellins: That is correct.

The Referee (Continuing): ——“as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain action against the plaintiff thereon.”

Now, what is the transaction set forth in the com-

plaint? The transaction set forth in the complaint is an agreement of partnership and a violation of that.

Mr. Wellins: That is right, but that is the manner in which the transaction is properly alleged for the purposes of a complaint. In order for this Court to determine what was [97] that transaction and whether Section 439 is applicable, Your Honor has to go one step beyond that to see what the nature of the transaction was, and that transaction was, as indicated by the documents I have here which are from the exhibit file in that state court action, *Quittner vs. White*, the same notes that I have been speaking of, the \$30,000.00 note, the \$5,000.00 note, and the \$25,000.00 note. That was the transaction and that is exactly the reason why Mr. White should in that action have filed a counterclaim against Mr. Herd for his claim arising under the \$30,000.00 note. His failure to do so comes within the meaning of Section 439.

The Referee: All right, now you get down to the law on the matter here. A files a suit against B alleging an existing or a dissolved partnership and praying for an accounting from B as to the transactions of that partnership. Now, as I understand it, that was the complaint here. At the time the action is filed or at the time of the trial A is indebted to B. You maintain that B must set forth that indebtedness in an answer or counterclaim or cross-complaint; is that right?

Mr. Wellins: Where the indebtedness arises out of that same transaction, as it did here.

The Referee: If it arises out of the partnership——

Mr. Wellins: Yes—out of the transaction as such, without regard to how it is carried, Your Honor.

The Referee: No, the transaction is the alleged partnership, [98] counsel.

Mr. Wellins: No.

The Referee: Well, all right, what you better do now is make your offer of proof of what evidence you wish to offer.

Mr. Wellins: Yes, Your Honor.

The Referee: All right, go ahead.

Mr. Wellins: I think Mr. Weber is more familiar with the documents. I wonder if he may do that?

The Referee: All right, let Mr. Weber do it then.

Mr. Weber: I offer in evidence a promissory note dated May 19, 1947, executed by Joseph G. White to George L. Gibbons, in the sum of \$5,000.00—payable to George L. Gibbons, in the sum of \$5,000.00.

Mr. Howard: We are familiar with them.

Mr. Weber: Previously marked Plaintiff's Exhibit No. 13 on March 15, 1949, in the action entitled Quittner vs. White in the Superior Court of Los Angeles County.

Mr. Howard: Is that a complete offer of proof of these documents?

Mr. Weber: No.

Mr. Howard: I have an objection to all of them which I would rather make at one time.

Mr. Weber: I offer to prove further this was received in evidence in the action last referred to by me and was the subject of testimony in that action. [99]

The Referee: Well, I think we have got a rather complicated situation here. Perhaps counsel for Mr. White may want to have this note in evidence here in support of their claim they make here but perhaps also in support of the Trustee's fourth separate and distinct defense they maintain that it is not admissible.

Mr. Horowitz: No. For the purposes of this trial, if your Honor please, we can't see how the admission in evidence of these notes can possibly be detrimental, and for whatever they are worth we would be willing to stipulate that they may be used in evidence.

The Referee: Very well. However, without waiving your right——

Mr. Horowitz: Without waiving our rights. So by stipulation we will jointly offer then this \$5,000.00 note which was described by Mr. Weber fully to your Honor and in the record.

Mr. Weber: And is the same stipulation offered with respect to the promissory note dated May 19, 1947, executed by Al Herd to Joseph G. White in the sum of \$30,000.00, which was marked Plaintiff's Exhibit 29 on April 4, 1949, in the action entitled Quittner vs. White?

Mr. Horowitz: Now, this is one of the exhibits——

Mr. Weber: Yes.

Mr. Horowitz: This is an exhibit in the Superior Court and we must not take it but we will have photostatic copies [100] submitted for this record.

The Referee: Let's take one thing at a time. The photostat of the \$5,000.00 note will be Trustee's Exhibit 15. The record shows that it is received by stipulation.

Mr. Weber: May we have leave to substitute a photostatic copy of it? This is an exhibit also in the other action.

The Referee: This isn't an exhibit.

Mr. Weber: Yes, that is an exhibit.

Mr. Horowitz: By stipulation we permitted the photostat to be filed in lieu of the original.

Mr. Howard: The original is in still another action as an exhibit.

Mr. Horowitz: That is a photostat of the original and the photostat was used in the Quittner vs. White suit. Now we would like to use a photostat of the photostat in the present proceeding.

The Referee: Well, all right. Then will it be understood that these instruments that you are agreed upon may be photostated and as and when they reach this Referee they will be marked as Trustee's Exhibits next in order?

Mr. Horowitz: Yes. Now, the next one will be the \$30,000.00 note dated May 19, 1947, in favor of Joe White, executed by Al Herd, which was Plaintiff's Exhibit 29 in case No. 542,157; and thirdly—this is also a photostat—and thirdly, the promissory note of Joe White and his wife, Marcella White, in favor of the Morris Plan Bank of [101] California, a corporation, dated May 21, 1947, in the sum

of \$25,000.00, which note was Plaintiff's Exhibit No. 1 in the Superior Court action No. 542,157.

Mr. Weber: And is it further stipulated that each of these instruments was the subject of testimony in the action entitled Quittner vs. White detailing the nature of the transaction which led to the execution of each of these documents?

Mr. Horowitz: Well, we can't stipulate as to what the testimony was. We will stipulate there was testimony with respect to the execution of these notes as there was testimony with respect to many, many other subjects.

The Referee: All right; proceed.

Mr. Weber: Is it further stipulated that each of these instruments was the same instrument referred to in the Amended Answer in this proceeding?

Mr. Horowitz: Yes, and that they were instruments offered in evidence by you for the purpose of trying to show that there was a partnership existing between Mr. White and Mr. Herd.

Mr. Weber: We offer to prove—we accept the stipulation that has been made of record up to now. We offer to prove further that the testimony in the Superior Court action related to the nature of each of these transactions, the testimony being given by witnesses in respect to their origin, purpose, and nature; and that the claims asserted by the [102] respondent White in his Amended Answer in these proceedings were the very claims which were the subject of testimony, both oral and documentary, in the Superior Court action.

We offer further to prove that the evidence in the Superior Court action in substance and effect was as follows: That the promissory note dated May 19, 1947, executed by White to Gibbons, was delivered to Mr. Gibbons in consideration in part of Gibbons lifting an attachment that had been levied upon the property of Al Herd, and that this promissory note was given to Gibbons in respect to the lifting of said attachment and the surrender or delivery of certain registration or pink slips pertaining to certain motor vehicles, and that in consideration therefor Gibbons credited the account of Al Herd to the extent of \$5,000.00, representing the principal amount of this promissory note.

Mr. Horowitz: To which general offer of proof we will object on the ground that it is incompetent, irrelevant and immaterial.

The Referee: Well, gentlemen, I don't think we will spend much time on arguing this question. As I read this section of the Code of Civil Procedure on which the Trustee and his counsel here rely, the cross-complaint or counter-claim or the affirmative answer must be filed upon something that is contained in the pleadings, in the complaint or the amended complaint if there be one, and is not required because of something that may develop in the evidence. If that [103] were true, why, you might have to stop the trial of a case right in the middle and say, "Here, now, wait a minute, I have got to get a cross-complaint in here because of what has developed in here."

So I'm going to sustain the objection.

Mr. Weber: Would the Court desire to hear argument on that point?

The Referee: No, I think it is clear, so I will sustain the objection.

Mr. Wellins: Your Honor, in Paragraph X of the complaint which your Honor read a moment ago, Sub-paragraph C, the plaintiff in the Quittner vs. White action alleged among other things that the defendant White was to pay to creditors of the bankrupt, for and on account of debts, theretofore incurred by the bankrupt, the sum of \$35,000.00, and that is the transaction about which the \$5,000.00 note refers—I don't mean "about which," I mean to which the transaction relating to the \$5,000.00 note refers, and the \$25,000.00 note, and that fits in exactly to the transaction alleged in the complaint; and Mr. White came back and said, "Yes, I gave the \$5,000.00 note to Mr. Gibbons and I gave the \$25,000.00 note to the Morris Plan Bank and I spent some other incidental monies in addition, but Mr. Herd gave me the \$30,000.00 note"; and that is the other note that Mr.—

The Referee: What paragraph of the Complaint did you mention? [104]

Mr. Wellins: X, your Honor. That is the transaction there alleged.

The Referee: Well, that is part of the agreement of partnership. You have got that right in with the agreement of partnership. Now, there is one isolated paragraph of your complaint that might give us some trouble, and that is Paragraph XX, that between the making of the partnership agreement and the filing of the petition in bankruptcy,

the bankrupt personally paid to the partnership employees some sum of money that Mr. White in your prayer was asked to contribute thereto. But even that is tied in with the partnership.

No, I don't see how you can make anything out of the Quittner vs. White suit except a partnership accounting suit.

Mr. Howard: Furthermore, if the Court please, the transaction upon which our claim here is based is the transaction between the Trustee and Gibbons and the manner of prosecuting the Gibbons action by the Trustee, a wholly separate transaction from both the \$5,000.00 note and the \$30,000.00 note and the partnership. Our claim here is on a third transaction even they admit.

The Referee: All right.

Mr. Wellins: Your Honor, the Trustee alleged transactions and the Trustee characterized them as a partnership. The court found the transactions took place with regard to [105] the notes but found that they did not amount as a matter of law to a partnership. However, we are not concerned with proving to your Honor that there was a partnership. That is not what Section 439 means or requires. Section 439 merely says that if it is part of that transaction then the defendant is obliged to file a counterclaim, if he has any. It does not matter what legal conclusion the Trustee ascribed to the facts related there. It is the transaction that is important, and the transaction here involved is the very one on which Mr. White now bases his claim.

The Referee: All right, but, counsel, every man is entitled to his day in Court and he should not be

denied his day in Court upon a sheer technicality, and therefore provisions of the law like Section 439 must be strictly construed. You have got to bring yourself absolutely within the section before you can deprive a man of his opportunity to be heard on what he claims is a cause of action.

Mr. Wellins: Your Honor, Mr. White had three weeks in Court——

The Referee: No, no more argument, sir. Objection sustained.

Mr. Wellins: I would like to complete our offer of proof then in order to have the record complete in that respect.

The Referee: All right, anything further you want to put in the record by way of an offer of proof? [106]

Mr. Wellins: Yes. We will offer to prove that on May 21, 1947, Joseph G. White and Marcella White executed a promissory note in the sum of \$25,000.00 to the Morris Plan Bank of California, a corporation.

The Referee: Let me stop you a minute. You have already stipulated that that may go into evidence. Isn't that right?

Mr. Horowitz: Certainly.

The Referee: All right.

Mr. Wellins: We further offer to prove that the \$25,000.00 note was the note involved in the transaction referred to in the Complaint, and that it is a portion of the \$35,000.00 referred to in Paragraph X-C of the Complaint which Mr. White advanced at that time, Mr. White having executed and delivered this \$25,000.00 note at that time.

We further offer to prove that Mr. White's testimony and Mr. Herd's testimony and the testimony of several other witnesses at the trial of Quittner vs. White all related to this transaction and the manner of the events leading up to the execution and delivery of this note by Mr. White and his wife to the Morris Plan Bank, who were creditors of Mr. Herd and who had levied an attachment on Mr. Herd theretofore and who released the attachment in consideration of Mr. White's execution and delivery of this \$25,000.00 note, and thereby permitted the automobile business of Mr. Herd to continue to operate.

Mr. Howard: To which we object, if the Court please, [107] on the ground it is incompetent, irrelevant and immaterial in that the evidence given in the trial cannot be relevant to the question of what transaction is set forth in the Complaint as the foundation of the plaintiff's claim therein.

The Referee: Objection sustained. Anything further?

Mr. Wellins: We further offer to prove, your Honor, that on or about May 19, 1947, Al Herd, who is the bankrupt herein, executed and delivered to——

The Referee: That note is going into evidence, isn't it, counsel?

Mr. Horowitz: That is already in evidence.

Mr. Howard: We have stipulated to the execution of the note.

Mr. Horowitz: I think if there are any more offers we should have them complete once and for all.

Mr. Wellins: Well, we will try to, Mr. Horowitz.

The Referee: All right, go ahead.

Mr. Wellins: We offer to prove that the \$30,000.00 note of May 19, 1947, executed by Al Herd and made payable to Joe White, to the order of Joe White, was delivered to Joe White on or about that date in consideration for and as part of the transaction relating to the \$5,000.00 note that Mr. White had therefore given Mr. Gibbons and the \$25,000.00 note Mr. White executed and delivered to the Morris Plan Bank, which notes were given in order to lift attachments and permit the business of Al Herd to continue to operate. [108]

Mr. Howard: To which we object, if the Court please—had you finished?

Mr. Wellins: I should add one more sentence, and that this is part of the transaction alleged in the complaint on the basis of which a partnership accounting was requested in the case of Quittner vs. White.

Mr. Howard: If the Court please, we object on the ground that it is incompetent, irrelevant and immaterial in connection with this matter in that this offer does not prove a transaction which is the basis of the plaintiff's Complaint in the accounting action.

The Referee: The objection is sustained. Any further offer of proof?

Mr. Wellins: If the Court please, at this time we offer by reference the transcript of the testimony of Joseph G. White on 21-A examination, hereto-

fore taken in this Court in the within bankruptcy.

Mr. Horowitz: To which we object on the ground it is incompetent, irrelevant and immaterial.

The Referee: Sustained. Let the record show that all of this now pertains only to the fourth separate and distinct defense. We are trying to dispose of that.

Mr. Wellins: We further offer to prove, your Honor, that Mr. Joseph G. White testified in the case of Quittner vs. White that the transaction between Mr. Herd and himself about which that complaint was filed was in reality one in [109] which he had loaned money to Mr. Herd and by way of writing, the \$5,000.00 note of which we have just spoken, and the \$25,000.00 note, and that Mr. Herd in consideration of that gave Mr. White the \$30,000.00 note about which we have also just spoken, and that that was the substance of Mr. White's claim on the transaction as alleged in the Complaint of Quittner vs. White.

Mr. Horowitz: To which we object as incompetent, irrelevant and immaterial.

The Referee: Sustained, and I'm not going to extend this record unduly, Mr. Wellins. I shall make a ruling that any of the testimony in the case of Quittner vs. White is incompetent, irrelevant and immaterial here as to this fourth separate defense. So let's have no further offers of proof along that line.

Mr. Wellins: Do I understand by the Court's ruling that you wish no further offers of proof—

The Referee: As to the testimony given in the case.

Mr. Wellins (Continuing): ——to explain the transaction alleged in the complaint? The only reason I am making these offers of proof is because I am trying to explain——

The Referee: Yes, I will make that ruling. We have the Complaint in evidence. It doesn't need any explanation.

Mr. Wellins: Very well, if that is the Court's ruling we will make no further offers of proof, but we do take the [110] position it does need explaining.

The Referee: All right, I can't go along with you on that.

All right, gentlemen, that seems to be all——

Mr. Wellins: I wonder if we can make a request to the Court about the order of proof? I have brought to the Court a number of books I will have to return tonight, pertaining to another separate and distinct defense, and I wonder if we could go to that one.

The Referee: Just a minute. The fourth separate and distinct defense is not well taken.

Now which one do you want to take?

Mr. Wellins: The last one, your Honor.

The Referee: And that is which one now?

Mr. Wellins: The fifteenth, your Honor.

The Referee: Have we that far to go? All right, the fifteenth separate and distinct defense:

“That the respondent White is barred from asserting or recovering on his alleged claim herein

by reason of the provisions of Sections 68 and 57(g) of the Bankruptcy Act; that the alleged claim of respondent White is not a mutual debt or credit between the estate of the bankrupt herein and the said White; that the alleged claim of the respondent White is not provable against the estate of the bankrupt herein; and that said claim is not allowable against the estate of the bankrupt herein under and by virtue of the [111] aforesaid provisions of the Bankruptcy Act."

Well, let's see. What is 57(g)? What is that about?

Mr. Wellins: That has to do with the allowability of debts that are unliquidated and are liquidated through the Bankruptcy Court.

The Referee: There is nothing unliquidated about this.

Mr. Wellins: Yes, your Honor. This claim, if there is any claim, arises under this \$30,000.00 note that Herd gave Mr. White, and he also received certain other security by way of assignments of reserves, and \$5,000.00 of it is evidenced by the amount—or a little over \$5,000.00 would be the amount that Mr. White would claim; but I prefer if we might to discuss the matter commencing with the words of Section 68 in order to make our position a little more intelligible.

The Referee: No, I don't think that we will spend much time on this one because this is rather a peculiar situation where Mr. White is contending among other things that this note is not actionable against him in the hands either of Mr. Herd or

of the Trustee in Bankruptcy. Isn't that one of your positions, gentlemen?

Mr. Howard: That is right, if the Court please.

The Referee: So the usual rules of set-off don't help us in that situation. And then they also maintain that they do have the right of set-off. No, this relates so closely to the very case that I don't think we will spend any time [112] on this this afternoon, or at least not at this moment, but we will go into these questions when we get into the main case. Why I'm going through these affirmative defenses here is to see if I can find one here that will make it unnecessary for us to hear the case in chief. If you have got some defense of estoppel or something like that, perhaps that will dispose of the entire case. But your fifteenth separate and distinct defense goes right to the heart of the whole case.

Mr. Wellins: We will defer the argument on that one then.

The Referee: Yes, we will hold that up. I'm sorry about your books.

Mr. Wellins: I will bring them back another time.

The Referee: All right. The next will be the fifth. On July 15, 1948, Mr. Wellins and Mr. Weber, as attorneys for plaintiff George L. Gibbons in said promissory note action, filed a motion for summary judgment, which motion was noticed for hearing in Department 35 of said Court on July 26, 1948. Said motion was thereafter continued to August 16, 1948.

I assume it is true, the allegation so far; is that correct?

Mr. Howard: Yes.

The Referee: "Prior to August 16, 1948, respondent White and his attorneys in said promissory note action knew that any and all proceeds which might be recovered in said [113] action would inure and belong to, and had been assigned by Gibbons, to the Trustee in Bankruptcy herein."

Well, that is denied.

Mr. Howard: Yes.

The Referee: "On or about August 13, 1948, with knowledge of the foregoing facts, Messrs. Horowitz & Howard, attorneys for the defendant in said proceeding (respondent White), served an amended answer to the complaint in said action wherein they failed to assert or make any defense, offset, counterclaim or cross-complaint in connection with the matters hereinbefore alleged, or any of the matters alleged in the amended answer filed in this proceeding by respondent White."

I imagine that is true, gentlemen, isn't it?

Mr. Howard: That is true, your Honor.

The Referee: Paragraph V, on or about August 16, 1948, said motion for summary judgment duly came on for hearing before said Superior Court, and said motion was thereupon argued by Alvin F. Howard.

That is true?

Mr. Howard: Yes.

The Referee: Paragraph VI:

"Plaintiff's motion for summary judgment was thereupon granted and judgment was thereafter entered in said action on August 25, 1948, pursuant

to the order of said Court granting said motion for summary judgment.” [114]

Mr. Howard: That is true.

The Referee: Paragraph VII, pursuant to the request of Messrs. Horowitz & Howard, attorneys for the defendant in said action, said Superior Court granted a 20-day stay of execution.

That is true?

Mr. Howard: That is true.

The Referee: Paragraph VIII:

“At no time prior to the payment and satisfaction of said judgment as aforesaid did the defendant in said action, or did his attorneys, assert any claim, counterclaim, defense or offset, or initiate any motion, proceeding or action in connection with the matters hereinbefore alleged, or the matters alleged in the respondent’s amended answer in this proceeding.”

That is true?

Mr. Howard: Yes, that is true.

The Referee: Paragraph IX:

“By reason of the premises, the respondent is precluded and estopped from asserting all or any of the matters alleged in his amended answer herein.”

Well, that is just about the same as we have already been going over. There is no further evidence is there, counsel?

Mr. Wellins: No, there is no——

The Referee: Except the two lawyers that are not here? [115]

Mr. Wellins: Except the two lawyers that are

not here, that is right. There is a considerable amount of legal argument that the Trustee would like to make on that subject, however, in view of the testimony as it is already admitted without controversy by both sides.

The Referee: No. The Court rules that the fifth separate and distinct defense is not well taken.

Now we come to the sixth, on or about May 3, 1948, the Trustee filed a verified petition with the Referee in Bankruptcy for leave to compromise the aforesaid suit theretofore brought by the Trustee against Gibbons.

Well, I take it that that may be admitted, the first part of it? That is, the first paragraph there?

Mr. Howard: Yes, if the Court please.

The Referee: All right, Paragraph II, in addition thereto the proposed written settlement offer made by Gibbons to the Trustee was attached to said petition as Exhibit A thereof, which settlement offer reads in part as follows:

I assume that will be conceded.

Mr. Howard: Yes, if your Honor please.

The Referee: Paragraph III:

“Pursuant to the prayer of said petition, a notice of hearing was thereupon sent by the office of the Referee to all listed or known creditors of the bankrupt, which notice was dated May 6, 1948. Said notice set forth, among other things, the terms of said offer of settlement,” etc. [116]

I assume that may be admitted?

Mr. Howard: If it can be stipulated that Mr. White was not one of the known creditors who re-

ceived that notice.

The Referee: No, that doesn't say he was one. That may be a matter of defense.

Mr. Howard: All right.

The Referee: It was sent to all listed or known—well, no, I don't think that word "known" is good in there. We don't do that. The Referee sends notices to the creditors appearing in the schedules, creditors appearing on claims, and creditors who have asked for notices, or for that matter whether a person is a creditor or not, any person who has asked for copies of notices.

Mr. Wellins: We will stipulate that it may be understood that the notice went only to those persons described in the last statement of your Honor.

Mr. Howard: Not to the respondent?

The Referee: Well, I don't know. I don't know whether his name is in there or not.

Mr. Horowitz: No, that is all right.

The Referee: That is without prejudice to your showing that he was not a listed creditor or had not filed a claim or had not requested a notice.

Mr. Howard: With that understanding that is all right.

The Referee: All right, on May 19, 1948, said petition to compromise the Trustee's action against Gibbons came on [117] for hearing and the petition was thereupon granted without opposition.

Any question about that?

Mr. Horowitz: Not a bit.

The Referee: Paragraph V, on May 25, 1948, an order was entered by the Referee in Bankruptcy

herein confirming said compromise, which order reads in part as follows:

Is that conceded?

Mr. Howard: Yes, if the Court please.

The Referee: All right, Paragraph VI:

“Pursuant to said order confirming said compromise, Gibbons executed an assignment to the Trustee, dated ‘June . . , 1948,’ of all his right, title and interest in and to any recovery in his then pending action against White upon said promissory note.”

Now, do you gentlemen concede that?

Mr. Howard: Yes, if the Court please.

The Referee: All right, Paragraph VII:

“Thereafter, and on or about June 16, 1948, the Trustee filed his petition with the Referee in Bankruptcy herein, for an order authorizing Messrs. Wellins and Weber to substitute themselves in the place and stead of the law firm of Jones & Wiener.”

Any question about that?

Mr. Howard: No, if the Court please.

The Referee: Paragraph VIII, on or about June 16, 1948, [118] an order was entered by the Referee in Bankruptcy herein authorizing said substitution.

Any question there?

Mr. Howard: No.

The Referee: Paragraph IX, thereafter, and pursuant to said order authorizing such substitution of attorneys, a copy of the substitution of attorneys was served.

Is that admitted?

Mr. Howard: Yes, if the Court please.

The Referee: All of that Paragraph IX?

Mr. Howard: Yes.

The Referee: Paragraph X:

“At all times herein mentioned, respondent White and his attorneys in said action knew of the pendency of these bankruptcy proceedings and that Messrs. Wellins and Weber, the successor attorneys for the plaintiff in said promissory note action were also the attorneys for the Trustee in Bankruptcy herein.”

What about that one? There is some question on that one, isn't there?

Mr. Horowitz: Yes. The question is—we knew as I testified that Weber and Wellins were attorneys for the Trustee in Bankruptcy and we knew after we got notice of the substitution that Messrs. Weber and Wellins were attorneys for Gibbons; but at all times mentioned here that we knew both items, that we cannot admit. [119]

The Referee: All right. Paragraph XI:

“The respondent and his attorneys were negligent in failing to examine the files and records of the Referee in Bankruptcy herein, which examination, in the exercise of reasonable diligence, should have been made.”

Well, you won't agree to that, of course?

Mr. Howard: That is denied.

The Referee: Nor will you agree to No. 12 which, of course, is simply a conclusion that if an examination had been made it would have disclosed what was in the file—well, that is true. Anybody that had

examined the file would have found what was in it.

Mr. Howard: Yes.

The Referee: Paragraph XIII:

“By reason of the foregoing, the respondent is estopped and precluded from asserting, maintaining or claiming his ignorance of the Trustee’s interest in the recovery in said promissory note action, and all or any of the matters alleged in his amended answer herein.”

Well, now, I suppose the only evidence that either of you may want in connection with that is whether or not the respondent White was among those who got the notice or to whom a notice was sent. What do you want to do about that?

Mr. Weber: Before we proceed with that, I have been wondering if I should move to amend this defense by including an allegation concerning the filing of the stipulation by [120] Mr. Gibbons withdrawing his claim in bankruptcy? That has been previously marked as an exhibit in evidence but that contains recitals which I would like to include in this defense.

The Referee: Well, you may have leave to supplement this by such a recital if you like.

Mr. Howard: Filed, as I understand it, in the bankruptcy proceeding?

Mr. Weber: That is right.

The Referee: Send counsel a copy of whatever you send in.

Now, counsel for Mr. White, what do you want to do about the question of any proof on the question

of whether or not Mr. White was one of those who received the notice?

Mr. Horowitz: Well, the records of the Bankruptcy Court disclose that Mr. White was not among those who received a notice.

The Referee: What do you say, gentlemen?

Mr. Wellins: So far as I know that is correct.

The Referee: He did not receive a notice?

Mr. Wellins: He did not receive a written notice.

Mr. Weber: That is, the files do not show that Mr. White received written notice.

The Referee: All right.

Mr. Horowitz: Then the question is whether or not from the evidence we were guilty of negligence in not looking to [121] see whether or not the representations that were made to us were true or false.

Mr. Weber: That is a false statement. There were no representations made, and I would like Mr. Horowitz to point out to me the representations that were made.

The Referee: Well, I think that is immaterial now. The whole sum and substance of this defense then is that Mr. White and his attorneys made no effort—that they should have come over here and looked at this file and if they had come over here they would have found an assignment of the proceeds of the recovery.

Mr. Weber: May I give the Court two citations on that point which may be of interest?

The Referee: I would be interested.

Mr. Weber: *Hildreth vs. James*, 109 California 301.

The Referee: What does that hold?

Mr. Weber: That was an action to set aside a judgment and quiet title, and several years after the entry of judgment they brought an action to set it aside, and the Court said:

“In the complaint no facts are averred showing any diligence on the part of appellants, at the time of the pending of said action of *Kate D. McLaughlin vs. Laura J. Hildreth, et al.*, to discover what they now allege to have been a defense to said action.”

They claimed certain fraud had been committed incident [122] to the first transaction in that a deed that was absolute on its face was in fact a mortgage, and they held that the concealment of that fact was a defect in the former action that was a justification or basis for setting aside the former judgment because they did not know that the deed that was absolute on its face was in fact a mortgage; and the Court said——

The Referee: I'm not interested in the case. What other citation do you have?

Mr. Weber: Well, I think the Court would find this language also quite pertinent if I may quote it. It is rather short:

“If this be true there was a public record at the time of said action which would have been evidence of the fact claimed to have been concealed. We think that the averments of the complaint are totally insufficient to warrant a decree setting aside a solemn judgment of the court of record, especially after it has stood for so long a period unchallenged.”

The Referee: I'm sorry, sir. I don't want any argument.

Mr. Weber: It would appear clearly——

The Referee: I don't want any argument.

Mr. Weber: We do not pretend these citations are exhaustive. There are many others. Hecht vs. Slaney, 72 California 363. [123]

The Referee: No, I don't think those cases at all approach our situation here. I do not quarrel with the cases as setting forth the law in the particular situations therein involved but I think our situation is quite different.

All right, which one is this now?

Mr. Howard: No. 6.

The Referee: The 6th separate and distinct defense is not well taken.

The seventh separate and distinct defense:

“Under and by virtue of Section 385 of the Code of Civil Procedure of the State of California, the plaintiff in said action, to wit, George L. Gibbons, was the proper party to maintain and continue said action, and to prosecute the same as plaintiff, and was at all times the real party in interest therein.”

Well, I will make a finding at this time that that is not true. Gibbons was not the real party in interest at all times after this Court approved the compromise between the Trustee and Gibbons and Gibbons consummated that compromise.

So the seventh separate and distinct defense is not well taken.

Mr. Wellins: I presume that your Honor does not wish to have any oral argument or citation of

authorities on that subject at this time, although we do have some authorities to present to your Honor in addition to those cited in our [124] memorandum.

The Referee: All right. I don't want anything further at this time.

The eighth separate and distinct defense:

"At no time has the respondent ever filed a claim against the bankrupt in these bankruptcy proceedings, and that the time for the filing of creditor's claims herein has expired."

So stipulated, gentlemen?

Mr. Howard: Yes, if the Court please.

The Referee: Paragraph II:

"By reason thereof, the claims set forth in the respondent's amended answer are not maintainable against the Trustee in Bankruptcy."

All right, the eighth separate and distinct defense is not well taken.

The ninth separate and distinct defense:

"The Trustee incorporates herein by reference each and every allegation contained in paragraphs I to XII inclusive of the sixth separate and distinct defense, and paragraph I of the eighth separate and distinct defense herein set forth.

"By reason of the premises, respondent White is estopped and precluded from asserting or claiming ignorance of the Trustee's interest in and to the proceeds of said recovery, or of any of the facts herein set forth, of which he would have had notice if his alleged claim had been filed in the [125] above bankruptcy proceedings; and from charging or im-

puting to the Trustee any breach of duty in allegedly failing to notify the respondent independently of the foregoing matters spread upon the records of this Court, and of which all creditors whose claims were duly filed had notice.”

Well, the 9th separate and distinct defense is not well taken.

The tenth separate and distinct defense:

“There is a defect of parties in this proceeding in that the plaintiff and judgment debtor in said promissory note action, to wit, George L. Gibbons, is not a party to this proceeding, and that he resides outside the jurisdiction of this Court, to wit, in the State of Arizona.”

Well, do you say Mr. Gibbons is a necessary party here?

Mr. Wellins: Yes.

The Referee: Why?

Mr. Wellins: In the first place, your Honor, he is the judgment creditor. In the second place, the effect of the proceeding here involved is to collaterally attack and destroyed the effect of that judgment. In the third place, there are allegations in the Amended Answer to the order to show cause that Mr. Weber and I were purporting to represent Mr. Gibbons as his attorney but were in fact not representing him as his attorney, and therefore his status as a client and the employment of one or more persons, including Mr. Weber and myself, is necessarily in issue. [126]

Now, the only thing in evidence here is his signed substitution of attorneys and his erstwhile attor-

neys' consent to that substitution and our undertaking to accept it, along with the approval of the Court on petition and order. If this Court were to hear this matter, the effect would be that the finality of the judgment heretofore obtained would be affected and the rights of Mr. Gibbons would be in issue necessarily. Anything that we did in that action we did as his attorneys and also as the attorneys for the Trustee. He would be entitled conceivably to another recovery, among other things, there being—if the claim of Mr. White should prove successful here, and whether or not Mr. White is correct in his assertion that Mr. Quittner should have been substituted as the plaintiff in the case, which of course we submit is incorrect, Mr. Quittner could not have been substituted even if he had made a motion for substitution in that action at that time; but even if that were true, Mr. Gibbons would have to be a party to any action in that situation because until such a substitution is made Mr. Gibbons stands as the party plaintiff.

The Referee: Well, that is all very interesting, Mr. Wellins, but I don't think you ever had in mind you were going to charge Mr. Gibbons anything for your services, did you?

Mr. Wellins: We were not going to make any independent charge to him, and we are not trying in this manner to secure [127] any compensation for our services.

The Referee: No, you simply prosecuted the action in the name of the assignor; isn't that true?

Mr. Wellins: We did exactly what we——

The Referee: As you say, and perhaps properly, under the laws of the state you had a right to do. Isn't that right?

Mr. Wellins: Yes. You mean we made no independent arrangement for compensation with him?

The Referee: That is right.

Mr. Wellins: This action continued in the name of the owner of the cause. The attorney fees were to be taken care of as part of the recovery in the case.

The Referee: As a matter of fact, there was never any discussion about attorney fees between you and Mr. Gibbons, was there?

Mr. Wellins: No, because the attorney fees were discussed in the note. The note provided for that and Mr. Gibbons did not retain that amount. That legitimately went to the Trustee.

The Referee: That is right, and your agreement with Mr. Gibbons was he would give you any kind of an assignment you wanted.

Mr. Wellins: That was not our agreement with Mr. Gibbons.

The Referee: Be careful what you are saying, sir. [128]

Mr. Wellins: Our agreement with Mr. Gibbons is set forth in our petition. Mr. Gibbons made an offer of compromise.

The Referee: His proposal to you then was that he would give you any kind of assignment you wanted?

Mr. Wellins: I wouldn't put it that broadly.

The Referee: He would assign the cause of action or the proceeds of the action?

Mr. Wellins: He offered those two alternatives. He didn't say he would give us any kind of agreement we wanted. As a matter of fact, we negotiated several months on various aspects of the agreement and couldn't get it.

The Referee: But he told you he would give you an assignment of the cause of action or an assignment of the proceeds?

Mr. Wellins: Exactly as it is in the petition.

The Referee: You are not going to try to deceive the Court, are you?

Mr. Wellins: Certainly not, but we have to have a complete statement and that is not the complete statement. We were to get \$3,000.00 and in addition——

The Referee: Wait a minute. You are questioning the Court and I want to get it straight.

Mr. Weber: I would like to express my amazement at the characterization just levelled at my colleague.

The Referee: What was that, Mr. [129] Singeltary?

(Record read.)

The Referee: All right. Here is a copy of Mr. Gibbons' proposal attached to the petition to compromise the Trustee's claim against George L. Gibbons, filed May 3, 1948.

“Without prejudice and without conceding the truth of any of the allegations in the complaint in this action, I hereby offer in full settlement of the above action the sum of \$3,000.00 payable as fol-

lows: the sum of \$1500.00 on or before May 15, 1948, and the sum of \$1500.00 on or before June 15, 1948.

“In addition thereto, I agree to transfer and assign to you all my right, title and interest in and to that certain promissory note heretofore executed by Joseph G. White to me, dated on or about May 19, 1947, in the sum of \$5,000.00, plus interest and attorney’s fees; or in the alternative, all my right, title and interest in and to any recovery by me thereunder. You shall have the right to determine whether or not the assignment shall cover the note or the proceeds of any recovery in the action now pending thereon.”

Mr. Weber: Does that square with deception practiced upon the Court?

The Referee: I’m not going to get into any controversy with you, counsel, as to what the Court said. I will simply say this, that your tenth separate and distinct defense is not well taken and is absolutely without any merit whatsoever. [130]

The eleventh separate and distinct defense:

“That the amended answer of the respondent White is insufficient as a matter of law and fails to state a claim upon which relief can be granted.”

It is the ruling of the court that the eleventh separate and distinct defense is not well taken.

The twelfth separate and distinct defense:

“That the Referee in Bankruptcy has no jurisdiction to grant the relief prayed for by the respondent White.”

Well, counsel, the Trustee filed a petition for an order to show cause requiring Mr. White to assert

any claim that he might have in and to the funds in the hands of the Trustee. How do you say that the Referee has no jurisdiction?

Mr. Wellins: In this way, Your Honor, that here without having had any claim filed, if there was a claim to be asserted, we asked that it be brought out into the open. We had no way of knowing the details of the claim.

Mr. Weber: I happen to be familiar with this feature of it, Your Honor.

Mr. Wellins: I will be glad to yield to Mr. Weber.

Mr. Weber: It is somewhat disconcerting for me to interrupt, and it must be to the Court as well. Mr. Horowitz telephoned Mr. Quittner and told him not to distribute the money available to creditors, and you asked Mr. Quittner what was holding up the distribution and he told you Mr. [131] Horowitz had called him, and you suggested his attorneys file an order to show cause so we could get the ball rolling, and we followed the suggestion of the Court. Now, in citing them in we did not bestow jurisdiction on this court to hear in a summary proceeding the matter of a judgment of another Court of competent jurisdiction. It is still our position that there is no jurisdiction in a Referee in Bankruptcy, nor is there in any other Court, to destroy or nullify a judgment of a court of competent jurisdiction, and that position the Trustee still urges.

The Referee: All right, the 12th separate and distinct defense is not sustained.

Mr. Wellins: There is one additional feature of

that, Your Honor, and that is the possible distinction between a plenary suit and a summary suit. When we were here before that matter was discussed a little bit, and we feel now that the Second Amended Answer is in that the only way that this proceeding can be determined is in a plenary proceeding, and we have authorities to that effect and would be glad to cite them to the Court. We don't believe that anything that the Trustee has done up to this date either confers jurisdiction or waives any right to mention the necessity for plenary jurisdiction in this matter, and I refer Your Honor to our earlier points and authorities which expressly call this matter to the Court's attention.

The Referee: All right, nothing further, gentlemen. [132] The 12th separate and distinct defense is not well taken.

The 13th separate and distinct defense is:

"The Trustee incorporates herein by reference each and every allegation contained in paragraphs I to VI, inclusive, of the first affirmative defense herein.

"That by reason of the premises, respondent White is barred from relief under the provisions of Section 473 C. C. P."

In other words, that he didn't move within six months, but I don't think that is applicable here. The burden of Mr. White's position here is simply that he did not know at the time of the judgment against him that the Trustee was the owner of the cause of action. He therefore was deprived of the opportunity of presenting the defenses that he now

asserts. I don't think that is governed by Section 473.

Mr. Howard: If the Court please, there are cases which we can cite which hold that the remedy urged here by Mr. White is cumulative with 473, and that if indeed he had proceeded under Section 473 and been denied relief, he nonetheless could have proceeded as he is proceeding here.

The Referee: I don't think we can take any time on that. The thirteenth separate and distinct defense is not well taken.

Mr. Wellins: Your Honor——

The Referee: What do you want to say?

Mr. Wellins: Well, I feel we are talking after the [133] matter has been decided. I would like to state our position in one sentence, but I feel I am almost out of breath trying to get a sentence in before the matter is decided, but I do have decisions on this matter if you want them. If you don't want me to say anything I will just save my breath, but I have cases in the Supreme Court that the Federal rules under Section 68 do not enlarge the state law but are merely further limitations on whatever the state law provides; and the burden would be on Mr. White to show more than six months elapsed without him taking the occasion to read the Federal files in bankruptcy, assuming that he had no other source of knowledge or information, and I do not believe that he has either sustained that burden of proof or that as a matter of law the particular affirmative defense can be ruled on independently of such proof.

The Referee: All right, the 13th separate and distinct defense is not well taken.

The 14th separate and distinct defense:

“That the respondent White has delayed unreasonably in presenting and filing his alleged claim herein, and by reason thereof that the respondent White is barred by laches from asserting the same.”

I suppose it may be stipulated that the Trustee in bankruptcy still has funds in his possession which have not been distributed?

Mr. Wellins: It may be so stipulated, Your Honor. [134]

The Referee: And obviously this Court is not going to grant Mr. White any relief, if it grants him any at all, which would require the Trustee to get back any money which he may have disbursed; and also the relief if it is granted, if any is granted, could be given only as to such monies as there remain in the hands of the Trustee after such expenses as the Court might fix were satisfied and paid. I mean we can't go back now and deprive people of money they have earned merely because of this particular situation.

Mr. Horowitz: That is correct.

The Referee: So, for instance, if I should decide Mr. White ought to have \$6,000.00, if I couldn't find \$6,000.00 in the hands of the Trustee after I had paid other things that I felt ought to be paid, then it would have to be reduced accordingly.

Mr. Horowitz: That is right.

The Referee: So with that in view I don't think that the plea of laches could be asserted here.

All right, the 14th separate and distinct defense is not well taken.

As far as the 15th is concerned, I think we will just take that along with the case in chief and see what should be done with that. There is no use trying to make a separate ruling on that because I do think that goes right to the very heart of our problem here.

Mr. Wellins: Does Your Honor think or feel that the [135] question of mutuality can be isolated from the heart of the problem? I mean by that the fact that Mr. Quittner, the Trustee, obtained the money, without talking about the legal questions, but he obtained the money by virtue of a compromise with Mr. Gibbons, and the right through which he obtained that was Mr. Gibbons' right to which he succeeded. The right which Mr. White claims here, without regard to whether he can establish it, is a right he has arising under the \$30,000.00 note and the claim of accommodation maker of the \$5,000.00 note. Now, that is a right, if it exists, between Mr. White and Mr. Herd. Now, the Courts have said, and that is the reason I brought these cases here, that the determination of whether or not Mr. White could, for example, urge his claim here is whether or not these debts and credits are mutual, and to be mutual they must arise, to use the words of the Courts, in the same right; and I believe on the face of the facts admitted here, it is concerning parties between whom these rights, if they existed, they did not arise in the same right, and I have some authorities on that.

The Referee: That may well be, and that is why I am not going to rule on the 15th separate defense, but I do say I think it is so closely associated to the main problem that we will just take it along in stride with the main part of the case.

Mr. Wellins: Very well, Your Honor. [136]

The Referee: We won't make a separate ruling on it at this time.

Now, gentlemen, it is 4:40 and I don't think I should impose on you further. We have disposed of everything now except what I regard as the heart of the case, and I don't know as we need a great deal of evidence further except maybe on the question of whether or not this is in fact an accommodation note. I'm not going to try the partnership issue again but simply whether or not Mr. White did receive any consideration, not that he was made a member of a partnership or anything like that. That has been settled. He was not a partner.

Mr. Horowitz: I think I can state the facts.

The Referee: Well, let's not take any time now. I think that was just a sort of a survey of what we have left to do because we can't finish tonight anyway.

(Discussion off the record as to a continuance.)

The Referee: All right, let's take an adjournment now until Tuesday, January 31, at 10:00 o'clock.

(Whereupon an adjournment was taken until Tuesday, January 31, 1950, at 10:00 o'clock a.m.) [137]

Certificate

I, H. A. Singeltary, hereby certify that on the 27th day of January, 1950, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Benno M. Brink, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 30th day of January, 1950.

/s/ H. A. SINGELTARY,
Official Court Reporter.

[Endorsed]: Filed January 31, 1950. [138]

January 31, 1950, 10 A.M.

The Referee: Al Herd.

Mr. Weber: Ready.

The Referee: All right, you may proceed, Mr. Horowitz.

Mr. Wellins: We have served this morning an amended reply to the answer of the respondent White here, your Honor, and we ask leave to file that at this time.

The Referee: Let me see it, please.

Mr. Horowitz: To which we object on the ground, if your Honor please, that there are no

matters stated in the amendment which are proper defenses. I take it that there is no opportunity for demurrer to them, but they will show that they are not proper defenses at all.

The Referee: All right, will you be seated a moment, Mr. White?

As to the proposed amendment, the first portion of it is a request that there be added something to the Sixth Separate and Distinct Defense which appears to be more by way of evidence than a pleading, namely, that on or about July 14th a written stipulation was filed in the above bankruptcy proceeding by said George L. Gibbons, which written stipulation reads in part as follows:

“Whereas, by order of the Referee the Trustee is authorized to settle and compromise the action heretofore brought by said Trustee against Gibbons upon payment by said Gibbons to the Trustee of the sum of \$3,000.00, and upon execution by said Gibbons of an assignment to the said Trustee [2] of all his right, title and interest in and to any recovery by said Gibbons in an action now pending in the Superior Court of Los Angeles County.”

Well, counsel, as far as I have read it doesn't make sense. There is no termination to it. It simply is a “whereas.” Now, what do you want to accomplish by this amendment?

Mr. Wellins: Because of the notice this gave to all the world as a public record, a part of this bankruptcy proceedings, and a record of that transaction there between the Trustee and Gibbons, and the reading of the file—this is only the additional facts

which the reading of the file would have disclosed.

The Referee: Well, counsel, your objection is that the amendments do not constitute or do not state grounds of defense. It is rather difficult for me to rule on that without giving thorough consideration to all of the allegations here. So if that is the only objection you will have to make I don't see how I can intelligently rule on it without studying all the defenses. What I thought you were going to do, I thought you were going to object upon the ground it was too late to make any amendments.

Mr. Horowitz: Well, we do that also. As I understand it, we have disposed of the first 14 of the defenses and we have left for consideration the 15th defense which we are going to dispose of today, I suppose. [3]

The Referee: If counsel for the respondent here is willing to stipulate that the allegation of the proposed paragraph 9-a of the Sixth Defense is true——

Mr. Horowitz: We will stipulate that that is true, your Honor.

The Referee: Then the motion for leave to file an amendment is denied.

Mr. Wellins: Well, we will accept the stipulation insofar as it goes and request the Court that in order that that section of the stipulation may be understood in the record that the document be filed.

The Referee: Isn't it already in evidence?

Mr. Wellins: The stipulation was that the substance of a certain paragraph is true.

The Referee: I mean isn't this document in evidence?

Mr. Wellins: No; that is the original, your Honor.

The Referee: Any objection to the entire instrument being received in evidence?

Mr. Horowitz: Yes.

The Referee: I mean the instrument filed on or about July 14, 1948?

Mr. Horowitz: No, there is no objection to that.

The Referee: All right, your motion for leave to amend is denied. I shall mark this as an exhibit as soon as I get the file.

So now we are taking up the case on its merits, the [4] petition or rather, the answer of the respondent here.

Mr. Wellins: Did I understand that your Honor marked the original of the document just handed to you as an exhibit in the case?

The Referee: This document (indicating)?

Mr. Wellins: Yes.

The Referee: Oh, no.

Mr. Wellins: We offer that as an exhibit in the case in order that your Honor's ruling disallowing the amendment may be in the record of the case.

The Referee: All right, just a moment until I get my file and I can examine things.

Now, let's see. You want the instrument filed when?

Mr. Horowitz: July 14th, I believe, the stipulation.

The Referee: Let's see whether that is right.

Mr. Wellins: I am not referring to an instru-

ment of July 14th. I am referring to this instrument just handed your Honor——

The Referee: No, the stipulation, we are going to get that in evidence first.

Mr. Wellins: Oh, thank you, your Honor.

The Referee: Let's see whether you have got the right date on that. Is it a stipulation withdrawing the claim of George L. Gibbons?

Mr. Weber: That is correct, your Honor.

Mr. Wellins: Yes, your Honor. [5]

The Referee: Now, that will be—gentlemen, there seems to be something wrong with my exhibit file. Let me send it out to be adjusted and then we will take this matter up before the noon recess.

Mr. Horowitz: There is another defense that they are trying to interpose also, a sixteenth defense in that document, not only—your Honor will note that they——

The Referee: I have denied their motion to amend but I am going to mark it as an exhibit for identification so it will be in the file.

Mr. Horowitz: Thank you.

The Referee: Do you want to call Mr. White as a witness?

Mr. Horowitz: Yes, your Honor.

The Referee: You have been sworn, Mr. White.

Mr. Wellins: Your Honor, the Trustee, Mr. Quittner, is here this morning and it might possibly save time, and I know that it will be a convenience to Mr. Quittner, if your Honor would hear Mr. Quittner, who wishes to address the Court on the subject of the Fifteenth Defense, which is the effect

of Section 68 of the Bankruptcy Act, and the sections thereunder referred to, on the claim of the respondent White.

The Referee: The motion is denied.

Mr. Wellins: Pardon me?

The Referee: You made a motion that I hear Mr. Quittner. The motion is denied. However, you have your Mr. Callister [6] sitting here. He is a busy man also, as you all are, but the rest of you have to stay here. Any possibility of getting Mr. Callister on?

Mr. Wellins: Yes.

Mr. Callister: I have a deposition, your Honor, and I would consider it a favor if you could take me now, ask me whatever they want me for.

The Referee: Any objection, gentlemen?

Mr. Horowitz: No, if the Court please, but may we inquire what matter Mr. Callister is going to be examined on, what defense?

Mr. Wellins: On all issues raised by the pleadings.

The Referee: What?

Mr. Wellins: On all issues raised by the pleading. His testimony will be on all issues raised by the pleadings.

The Referee: How long will he take?

Mr. Wellins: Perhaps about 15 minutes or so, maybe a little longer.

The Referee: In other words, he is in defense now on the merits; is that correct?

Mr. Wellins: He will be out of order, in defense on the merits.

The Referee: There will be no more evidence on the special defenses already ruled on.

Mr. Wellins: Is that the ruling of the Court, or are you asking counsel if we have any more evidence? [7]

The Referee: No, I say there will be no more evidence on the special defenses already ruled on by the Court. Now, the only evidence we have to be taken is on the case in chief, namely, the assertion by Mr. White that he has the right to recover the money now in the hands of the Trustee—evidence on that ground. As to any of the defenses of estoppel or anything like that, we are all through with those except the last one which I said would embrace practically the same question as the case on its merits.

Mr. Weber: May we have the Court's indulgence for just a moment?

The Referee: Yes.

Mr. Wellins: If the Court please, I understand your Honor's ruling and in complete deference to it I think we would like to make an offer of proof in order to protect the record.

Since Mr. Reed Callister is now here, we offer to prove if Mr. Reed Callister were called as a witness and permitted to testify with respect to the subjects of affirmative defense, that he will testify that he had a conversation while he was attorney for Mr. Joseph G. White with another attorney named George M. Wiener who was then counsel for Mr. Gibbons, the payee on the promissory note, during the time just prior to the consummation of the

Trustee's compromise with Mr. Gibbons and prior to the time that Mr. Horowitz was substituted as Mr. White's lawyer, in which Mr. [8] Wiener told Mr. Callister that negotiations were pending between the Trustee and Mr. Gibbons for the settlement and compromise of the Trustee's suit against Mr. Gibbons involving, among other things, the promissory note action between Mr. Gibbons and Mr. White, and that if Mr. White wanted to consummate any kind of a settlement with Mr. Gibbons he had better hurry up before Mr. Gibbons closed his transaction with the Trustee.

We further offer to prove that Mr. Callister if called as a witness with respect to the subjects of affirmative defense will testify that that while he was still attorney for Mr. White, and before Mr. Horowitz had been substituted as Mr. White's attorney, he, Mr. Callister, knew that the Trustee had settled and compromised his claim against Mr. Gibbons and that—may I re-word the last portion of it, if your Honor please?

The Referee: Yes.

Mr. Wellins: That Mr. Callister knew that the Trustee's lawsuit against Mr. Gibbons had been settled, and that this took place prior to the time that Mr. Horowitz became the attorney for Mr. White.

The other matters about which Mr. Callister is here to testify refer to the case in chief as distinguished from the affirmative defenses.

Mr. Horowitz: If your Honor please, we object to that on the ground that it is incompetent, irrele-

vant and immaterial, [9] on the further ground that the issue has been closed, and that I noticed that when Mr. Wellins was making his offer of proof Mr. Callister was violently shaking his head in the negative to——

The Referee: Well, we will leave that out of your objections, because——

Mr. Horowitz: That is right. I am through with my objection. In other words, there should be some disposition of the case and if we have these offers of proof and other matters coming up we will never be through with the case.

The Referee: Well, the record will show that in ruling on each and all of these affirmative defenses the Court in each instance inquired, "Is there further evidence," and the matters were closed. The Court made its rulings; and I am sure we all agree that this case has been before this Court and other Courts for a long time and we should get through.

The objection is sustained.

Now, is there still any possibility of getting Mr. Callister out of here without tying him up? Mr. White has to stay here, and Mr. Horowitz and Mr. Howard and the rest of you have to stay here. Mr. Callister doesn't.

Mr. Horowitz: We have no objection.

The Referee: Do you want to call him now or can't you call him until the other side puts on its evidence?

Mr. Wellins: Let me talk with Mr. Callister a second. [10]

I would like to put Mr. Callister on out of order, if the Court please.

The Referee: All right, you may step down, Mr. White.

Come along, Mr. Callister.

REED E. CALLISTER

called as a witness, being first duly sworn, testified as follows:

The Referee: State your name in the record.

The Witness: My name is Reed E. Callister. I am an attorney at law.

The Referee: All right.

Direct Examination

By Mr. Wellins:

Q. Have you at one time been attorney for Mr. Joseph G. White? A. I was.

Q. And during what period were you his attorney?

A. I would have to look at my records, if I may. I can't recall the exact time.

Mr. Horowitz: May I inquire whether this is with respect to a specific defense? If it is, may we have the specific defense so we will know what—

The Referee: I think we will let counsel proceed. You may make your objections to specific questions.

Mr. Horowitz: Thank you. [11]

The Referee: Proceed.

The Witness: If your Honor please, it was some

(Testimony of Reed E. Callister.)

time the latter part of May, 1947, to my best recollection.

The Referee: All right, proceed.

Q. (By Mr. Wellins): And did you have a discussion with Mr. White at or about that time regarding the formation of a corporation?

Mr. Horowitz: To which we object on the ground it is incompetent, irrelevant and immaterial to any issue in this matter.

The Referee: I will sustain the objection. Mr. Wellins, you are not going back into the lawsuit which was tried before Judge Stephens?

Mr. Wellins: We certainly are not, your Honor. We are not asking you to go back into it at all.

The Referee: I'm afraid we will have to hold Mr. Callister until we have the respondent's case so we will know what you are getting at.

Mr. Wellins: All right. Perhaps that is correct. I only did that for his convenience anyhow.

The Referee: I know. I would like to accommodate him but we will hear no evidence on anything related to the lawsuit decided by Judge Stephens.

The Witness: Could I come by 'phone call? I will come immediately.

The Referee: Well, we have had a lot of delays, Mr. [12] Callister. We cannot have any more delays.

The Witness: I wouldn't inconvenience the Court. I appreciate your courtesy in the matter.

The Referee: We have gotten to the time now where time is important. I don't think, however,

they will get to you before noon. What do you think, Mr. Horowitz?

Mr. Horowitz: I think we will be through with our testimony in 5 minutes.

The Referee: Oh, you will?

Mr. Horowitz: Yes.

The Referee: All right; come along, Mr. White.

JOSEPH G. WHITE

recalled, having been previously duly sworn and examined, testified further as follows:

The Referee: You have been sworn, Mr. White. Proceed, counsel.

Direct Examination

By Mr. Howard:

Q. Mr. White, you executed a promissory note in the sum of \$5,000.00 in favor of George L. Gibbons, did you not? A. Yes, I did.

Q. Will you tell us the circumstances under which that note was executed?

A. Well, Mr. Al Herd's account was attached at the bank and Al Herd asked me if I would sign a note for \$5,000.00 [13] in order to get the bank account released, and he told me just as soon as his bank account was released he would pay that note, which would only be a week or ten days at the most, just as soon as his bank account was in order.

Q. Did you have any understanding or arrangement—what was your understanding with Al Herd

(Testimony of Joseph G. White.)

as to whether or not you were to receive anything in connection with the execution of that note?

Mr. Wellins: Just a second. The form of the question is objected to as calling for a conclusion of the witness.

The Referee: Sustained.

Q. (By Mr. Howard): Did you in fact receive anything in connection with the execution of that note? A. No, I did not.

Mr. Wellins: I object to the question—I move to strike the answer for the purpose of making an objection.

The Referee: Motion granted.

Mr. Wellins: I object to the question as calling for a conclusion of law from the witness.

The Referee: Objection overruled. The answer may stand as the answer the question.

Mr. Howard: I did not hear the answer to the question.

(Answer read.)

Mr. Howard: No further questions.

The Referee: Cross-examine. [14]

Cross-Examination

By Mr. Wellins:

Q. Mr. White, when did you sign that note?

A. Oh, that I couldn't tell you. I don't exactly remember when it was. I think it was the day that his bank account was released, the Al Herd bank account was released.

(Testimony of Joseph G. White.)

Mr. Horowitz: The note is here. I think that will fix the date.

The Referee: The note is in evidence, is it not?

Mr. Horowitz: Yes, Your Honor.

The Referee: All right, the note is in evidence.

Q. (By Mr. Wellins): I will show you a photostatic copy of the note to refresh your recollection and call your attention to the date as May 19, 1947.

A. That is right.

Q. That is the date you signed the note?

A. That is right.

Q. All right. Now, at that time did you know that Al Herd was engaged in the automobile business? A. Yes, I did.

Q. Did you know that his place of business was at Sunset Boulevard and LaBrea Avenue in Los Angeles? A. Yes.

Q. And did you at that time—had you at that time already had a meeting with Al Herd at the Hollywood Athletic Club? [15] A. Yes.

Q. And had you at that time also had a meeting with Al Herd at the Morris Plan Bank?

A. Yes.

Q. And had you at that time information that there was a person named George L. Gibbons who had a claim for certain monies from Al Herd?

A. At that particular meeting, the first meeting?

Q. No, no, when you gave this note of \$5,000.00, you knew that Mr. Gibbons claimed Al Herd owed him some money, didn't you?

A. I knew that Mr. Gibbons had his bank ac-

(Testimony of Joseph G. White.)

count attached. That is all I knew, that his account was attached.

Q. And did you know that—at the time you gave this note, do you remember the fact that a man by the name of Karl also gave a \$5,000.00 note to Mr. Gibbons? A. Yes, I do.

Q. Now, under what—what were the circumstances of that?

Mr. Howard: I object to that, if the Court please. It wouldn't be relevant to the issues in this case, as to why another third party gave a note to Mr. Gibbons.

The Referee: Sustained.

Mr. Wellins: Oh, it is, Your Honor, it is.

The Referee: I'm sorry, no argument.

Mr. Wellins: We offer to prove it is part of the same [16] transaction and it shows the consideration in part.

The Referee: Sustained. The only evidence on direct examination was that Mr. White received nothing. It is improper cross-examination to the direct evidence but if there is any further evidence you can offer this if it is relevant. Proceed.

Mr. Wellins: We objected to the question, if the Court please, about what he received. I take it from the Court's answer that the Court did not consider that a conclusion of law but rather a statement of fact by the witness of what he received. I—and embraced the whole essentials of consideration. I don't think anything that would be con-

(Testimony of Joseph G. White.)

sideration to him under the law would be proper cross-examination.

The Referee: The ruling stands. Proceed.

Mr. Wellins: All right.

Q. Did you receive a note in the sum of \$30,000.00 from Al Herd on the same date that you executed and delivered the note of \$5,000.00 to Mr. George L. Gibbons? A. Yes.

Q. I show you this note for \$30,000.00, signed by Al Herd, payable to your order, and ask you if this is the note? A. That is right.

Mr. Horowitz: What is the date of that, counsel?

Mr. Wellins: May 19, 1947. Is that in evidence?

Mr. Weber: We got leave to substitute a photostatic [17] copy of this note.

Mr. Wellins: We offer this note in evidence as the Trustee's exhibit next in order, asking leave to substitute a copy.

Mr. Horowitz: I think that is in evidence.

The Referee: I thought that was already covered.

Mr. Wellins: I'm not sure whether it was or not.

Mr. Horowitz: I think it was. There was the \$25,000.00 that Mr. White gave to the Morris Plan Bank and \$5,000.00 to Mr. Gibbons and the \$30,000.00 note he gave to Mr. White.

The Referee: In any event, I'm sure counsel will stipulate he received the \$30,000.00 note from Mr. White.

Mr. Horowitz: That is right.

Q. (By Mr. Wellins): This is the same date

(Testimony of Joseph G. White.)

you gave the \$5,000.00 note to Mr. Gibbons?

A. It could have been the same day or the day after or a few days after.

Q. Mr. White, did Mr. Al Herd give you a paper with reference to a 10 per cent interest in his automobile business at or about the time that you gave Mr. Gibbons this \$5,000.00 note?

A. Mr. Herd never gave me any interest. I never got any interest, none whatever.

Q. Did Mr. Herd ever give you a paper transferring to you a 10 per cent interest in his automobile business at Sunset and LaBrea? [18]

Mr. Horowitz: Just a moment. We will object to that question on the ground that it is incompetent, irrelevant, and immaterial, not cross-examination.

The Referee: Sustained. I think if counsel has the paper he should produce it and show it to the witness.

Q. (By Mr. Wellins): Mr. White, you have previously been questioned about a certain paper purporting to transfer to you a certain 10 per cent interest in Al Herd's business, have you not?

Mr. Horowitz: I just don't understand the question.

The Referee: Will you please finish your question and say where he was questioned?

Mr. Wellins: In this court.

The Referee: In this court? All right.

The Witness: At one time Al Herd offered me a 10 per cent interest in his business if I would

(Testimony of Joseph G. White.)

carry through with Al Herd. In other words, I would—Al Herd wanted me to give him about another \$65,000.00 for outstanding checks and what not, insufficient checks and what not, and I told Al Herd then, I said, “Al, I didn’t mind”——

Q. (By Mr. Wellins): Just a second. What was the date of the occasion you speak of?

A. What was the occasion?

Q. No, what was the date of it?

A. Oh, that was about the time Al Herd was—left for Mexico. [19]

Q. Was it at or about the time that you gave the note to Mr. Gibbons, Mr. White?

A. No. That was quite a while after I signed that note for Mr. Gibbons.

Q. How long afterwards?

A. Oh, I don’t know. I would say maybe a month.

Q. What has become of that paper, Mr. White?

A. I don’t have it. I don’t have any paper for——

Q. When did you last have it?

Mr. Horowitz: Just a moment. The witness said he never had it.

The Referee: Sustained. Proceed.

Q. (By Mr. Wellins): Did Mr. Al Herd give you that paper?

Mr. Horowitz: Now, just a moment. We will object to the question. If there is a document let’s show him the document or a copy of the document

(Testimony of Joseph G. White.)

so we will know what he is talking about.

The Referee: Sustained.

Mr. Wellins: As counsel well knows we are trying to show to the Court what has happened to the paper and account for its whereabouts. The paper was delivered to the witness, and if the witness will answer the questions that will appear. He was the last one that had it.

The Referee: In any event, let's assume Mr. Herd gave this gentleman a paper where he transferred or agreed to [20] transfer a 10 per cent interest in the business. Doesn't that come within the scope of the partnership litigation?

Mr. Horowitz: Yes, Your Honor.

Mr. Wellins: Certainly not, Your Honor.

The Referee: Why not?

Mr. Wellins: We have to prove to this Court——

The Referee: Here is my point, if I can make myself clear: Certainly if you had shown to Judge Stephens that Mr. Herd had delivered to Mr. White and Mr. White had accepted an interest which transferred 10 per cent of the business to Mr. White, would that not have sustained your cause of action against Mr. White?

Mr. Wellins: Your Honor is going a step beyond the 10 per cent paper in his thinking, and I appreciate how forehanded Your Honor is in his analysis of the matter; but as Your Honor very aptly put it the last time we were in court, we are not concerned here with whether Mr. White was Mr. Herd's partner, and that is all Judge Stephens

was called upon to decide. We are concerned with whether or not this was an accommodation transaction, or if not being a partnership it was certainly something other than accommodation by way of certain consideration that moved to the parties.

The Referee: All right, but as I say, supposing that the instrument was delivered, it was accepted, and it was a present transfer or assignment of a 10 per cent interest. What would that have made Mr. White and Mr. Herd? [21]

Mr. Wellins: There was testimony in the partnership action, if Your Honor wants to hear my explanation, as to what happened later with that paper, and that it was subsequently, according to Mr. White's testimony, modified and not acted upon as such by him but that instead a different type of business relationship was inaugurated between Mr. Herd and Mr. White in place of the 10 per cent paper. This 10 per cent paper is one of the indications that Mr. White anticipated a financial gain from his transaction with Mr. Herd, and this Gibbons note is one of the things that are involved in Mr. White's giving of his money or credit on behalf of Mr. Herd, and what he expected to receive in the way of some gain or benefit is limited in part by the receipt of this 10 per cent paper.

The Referee: Well, let's assume, Mr. Wellins, that you and Mr. Weber will show that Mr. White at the time he gave Mr. Gibbons the note hoped that thereby he might later on gain something from Mr. Herd, an interest in the business or what not; but it has been established judicially that he did

not acquire an interest in the business, did not become a partner. Therefore, in view of that ruling, notwithstanding Mr. White's expectation, if this note were now in Mr. Herd's hands as distinguished from the hands of the Trustee in Bankruptcy could Mr. Herd enforce it against Mr. White merely because at the time the note was given Mr. White expected to get something which he never did [22] get?

Mr. Wellins: That question must be limited to exactly the way Your Honor puts it. It covers two subjects. The last part of it would have to be answered no, but the first part of it assumes something more than Judge Stephens decided. Judge Stephens only decided that they weren't partners.

The Referee: In any event, this sort of discussion and testimony was in the partnership case, wasn't it?

Mr. Wellins: Yes, Your Honor.

The Referee: All right, objection sustained. Give me something that you didn't have over in the partnership case. Sustained. Proceed with your questioning, please.

Mr. Weber: In view of the Court's ruling, I can see nothing remains for us to do but make an offer of proof.

The Referee: Very well.

Mr. Weber: We offer to prove that at or about the time of the execution of the Gibbons note by the respondent White there was a paper purporting to evidence a 10 per cent interest in favor of Mr. White in the Herd business; that no interest on the

loan from White to Gibbons was ever discussed with Herd; that one Dick Allard, the brother-in-law of the respondent White, made a trip to the City of Rialto in the month of May, 1947, to ask the respondent White to advance certain monies, including the Gibbons note, with the aim in view of giving Mr. Allard a 15 or 20 per cent interest in the Herd business; that pursuant thereto Mr. [23] White thereafter had meetings with Mr. Herd and others, in the course of which a \$25,000.00 note was given to the Morris Plan Bank, the one in evidence; that the \$5,000.00 note was given to Mr. Gibbons; that the parties discussed the formation of a partnership; that at or about that time they consulted or retained Mr. Reed Callister with the aim in view of forming a corporation known as Al Herd, Inc., to do business in association under corporate form; that thereafter the corporation of Al Herd, Inc., was formed under the laws of the State of California in or about the early part of June pursuant to previous meetings hereinafter referred to; that the parties discussed the relative merits and demerits of doing business in association, either in partnership or corporate form; that Mr. White at or about that time was advised not to go into the partnership but to go into the corporate structure; that the parties also discussed—that is the respondent White and Herd—discussed at or about the time the transaction with Gibbons took place the assumption of debts that Herd had theretofore incurred in connection with his automobile business; that at or about the same time the parties discussed

the transfer and assignment of certain assets of Herd to the corporation that the parties had in view in those meetings and at the time of the Gibbons transaction;

That there were transactions had at or about the time of the Gibbons transaction concerning the liabilities of [24] Herd, and that the respondent White at or about the time of the execution of the White note to Gibbons informed himself as to the assets and liabilities of Herd and obtained a financial statement of at least part of the liabilities of the bankrupt; that the parties discussed, and by "parties" I mean the Respondent White and the bankrupt, discussed with one Richard Stone a division of the so-called auction phase of the bankrupt's business, in the course of which there was an agreement reached on a division of the auction business in three ways, that is an equal division, a three-way split, one-third to White and one-third to Herd and one-third to Stone;

That to initiate that agreement or understanding of the parties a written document was prepared and signed between Al Herd, Inc., and Richard Stone; that at or about that time the respondent White went to the City of Rialto in connection with a plan to raise money by either selling or encumbering his orange grove in the City of Rialto, with the aim in view of placing the proceeds in the business; that he went to the City of Chicago at or about that time, or in the month of June, 1947, for the purpose of raising additional money to put into the automobile business; that he had requested or that

he also discussed with Mr. Herd certain employment security for Mr. Allard, his brother-in-law, in connection with the automobile business; that at or about the same time, or shortly thereafter, or in the month of June, 1947, this respondent [25] made payments to a number of creditors of the bankrupt, including but not limited to one Dillon, Richetti, and Slabdonick;

That on or about June 6, 1947, he paid the payroll of the Herd automobile business by checks issued by the Bank of America, Redondo Beach, and drawn upon the account of the respondent, and that the respondent discussed at meetings at the Hollywood Athletic Club a number of other percentage participation interests in the Herd business, depending upon the amount which was ultimately advanced or agreed to be advanced in connection with the automobile business.

Mr. Horowitz: To which we object on the ground it is incompetent, irrelevant and immaterial, and not proper cross-examination, and I might say also that what counsel has mentioned is simply some of the numerous items that were litigated in full in the Superior Court action on which we spent so many days and which is now *res adjudicata* between Mr. White and the Trustee in Bankruptcy.

Mr. Weber: For the sake of the record, I would like to state that this offer has not been made with the aim in view of establishing a partner relation. It is the position of the Trustee that the relationship between the respondent White and the bankruptcy may have been something other than

partnership, but in any event this is competent evidence to indicate that in the execution of the Gibbons note the respondent had in view the expectation of a possible benefit, [26] even though being short of a partnership relation. In other words, a negative finding on the existence of a partnership does not negative the existence of some other or lesser business interest or benefit situation.

The Referee: The objection is sustained.

Mr. Weber: And continuing the offer, I offer in evidence a series of checks previously marked in evidence in the Superior Court action entitled Gibbons vs. White, the checks collectively marked Plaintiff's Exhibit 6, consisting of 5 checks, all of which are dated June 6, 1947, drawn on the Bank of America, Redondo Beach, for the account of Joseph G. White.

The Referee: Is there objection?

Mr. Horowitz: Are you through with your complete offer, because I'm not going to make the objection until you are through because each time the objection is sustained they have an idea, which I hear a rumbling of, and I want to make the objection now when they are all through with their offer.

Mr. Weber: The payees of which are as follows: William F. Hamm, Barbara Felton, Harrison Carroll, Ann Allen, Richard Allard, all of which payees are employees of the Herd business.

We offer to prove that.

We also offer in evidence a series of additional checks, a check dated June 4, 1947, payable to J.

E. Dillon in the [27] sum of \$400.00, by Joseph G. White, drawn on the Bank of America, Redondo Beach; and we offer to prove further that Mr. Dillon was a creditor of the Herd business.

We introduce in evidence a check dated June 7, 1947, in the amount of \$500.00, payable to one Glen Miller, drawn by Joseph G. White on the Bank of America, Redondo Beach; and we offer to prove that Glen Miller was a creditor of the Herd business.

We offer in evidence a check dated June 4, 1947, payable to Hal Engels in the sum of a thousand dollars, drawn by Joseph G. White on the same bank; and we offer to prove that the said Hal Engels was a creditor of the Herd business.

We offer in evidence a check dated June 6, 1947, payable to one John J. Burkhard, in the sum of \$88.10, drawn by Joseph G. White on the Bank of America, Redondo Beach; and we offer to prove that the said John J. Burkhard was then an employee of the Herd business.

We offer in evidence a check dated June 6, 1947, in the sum of \$53.42, payable to one Thurman Lee Chidester, drawn by Joseph G. White on the same bank; and we offer to prove that at that time the payee, Thurman Lee Chidester, was an employee of the Herd business; and in each case where the check is payable to an employee we offer further to prove that the check was in compensation or payment of

earnings or wages due in connection with the Herd business.

We offer in evidence check dated June 5, 1947, payable [28] to one F. J. Sanders, drawn by Joseph G. White on the same bank, for \$537.50; and we offer to prove that the said F. J. Sanders was a creditor of the Herd business.

We offer in evidence a check dated June 2, 1947, in the sum of \$1,000.00, drawn by Joseph G. White on the Bank of America, Redondo Beach, payable to one George Slabdonick; and we offer to prove that the said George Slabdonick was a creditor of the Herd business; and wherever I have referred to creditors of the Herd business we offer further to prove that these checks were in payment of obligations owed by the business to the respective creditors.

We offer in evidence—oh, this is already in evidence, if the Court please.

We offer in evidence the exhibit collectively marked Plaintiff's Exhibit 19 in the accounting action brought by the Trustee against Joseph G. White in the Superior Court, consisting of the Articles of Incorporation of Al Herd, Inc., dated May 28, 1947, and acknowledged on that date, bearing the signature of Al Herd, Joseph G. White, and Marcella M. White, the wife of the respondent White; the By-laws of said corporation, to wit, Al Herd, Inc., acknowledged June 11, 1947, and signed by Al Herd, Joseph G. White, and Marcella M. White as directors; the Waiver of Notice of First Meeting of Stockholders, dated June 11, 1947;

the Minutes of the First Meeting of the Incorporators of Al Herd, Inc., on that date, signed by Joseph G. White as [29] Secretary and Al Herd as Chairman; The Waiver of Notice of First Meeting, bearing that date, signed by Al Herd, Joseph G. White, and Marcella M. White; the Minutes of the First Meeting of the Board of Directors of Al Herd, Inc., held June 11, 1947; a sample stock certificate; the Minutes of the Board of Directors of Al Herd, Inc., held June 20, 1947, signed by Al Herd, Joseph G. White, and Marcella M. White; and the Permit issued by the Commissioner of Corporations of the State of California, dated June 18, 1947, authorizing the issuance to Al Herd, Joseph G. White, and Marcella M. White, an aggregate of not to exceed, to any or all of them, 50 of its shares at par for cash.

We offer in evidence Plaintiff's Exhibit 36 in the action entitled Quittner vs. White, which is a copy of an Auction Notice issued with the consent of the respondent White in connection with the sale of his ranch or orange grove at the City of Rialto, the proceeds of which were to be applied to the Herd business.

We offer in evidence a certified Copy of the Articles of Incorporation of Al Herd, Inc., which is endorsed with the filing stamp June 9, 1947, Secretary of State.

We offer in evidence what appears to be a schedule previously marked Plaintiff's Exhibit 14 in the accounting action entitled Quittner vs. White, which bears the legend, "Recap—Outstanding Debts," and

we offer further to prove that this schedule was prepared at the direction of the [30] respondent; that the liabilities therein listed pertain to the Herd business; that the handwritten comments on the reverse side of the last page reading, "Jack Prager, \$2200.00, Dillon, \$800.00, George Slabdonick, \$1200.00, and Mansfield, question mark," were affixed thereto by the respondent White in his handwriting, and that the individuals last named were at the times previously mentioned, or about those times, creditors of the Herd business.

We offer in evidence the exhibit which was previously marked in another proceeding in this court, Your Honor, the assignment dated May 21, 1947. It has been marked as an exhibit in connection with the Pacific Finance matter as I recall. Is the exhibit file handy, Your Honor?

Mr. Horowitz: Are you through with this offer of proof? Is this something different from your offer of proof?

Mr. Weber: No, this exhibit was offered in another case.

Mr. Horowitz: I mean are you through with your offer of proof?

Mr. Weber: No, not quite through.

Mr. Horowitz: All right.

Mr. Weber: Here it is right here.

I offer in evidence a copy of the assignment dated May 21, 1947, previously marked Trustee's Exhibit A for identification on October 4, 1949, which is a true copy of [31] the exhibit marked Plaintiff's Exhibit 26 in the accounting action en-

titled Quittner vs. White; and in that connection we might segregate that assignment from the other exhibits, and we propose to make that offer quite apart from the other exhibits which are offered at this time.

We offer in evidence——

Mr. Horowitz: You offer to prove now?

Mr. Weber: No, we are offering the exhibit.

Mr. Horowitz: All right.

Mr. Weber: We offer in evidence the Application for Stock Permit with respect to Al Herd, Inc., dated June 11, 1947, and signed Cannon & Callister by Reed E. Callister, and acknowledged on June 11, 1947, previously marked Plaintiff's Exhibit 20 in evidence in the accounting action entitled Quittner vs. White; and we offer to prove further that this was prepared by Mr. Callister pursuant to the instructions of the respondent White.

We offer in evidence Application to the Board of Police Commissioners for a permit to conduct a secondhand motor vehicle business, dated July 15, 1947, signed by Joseph G. White, previously marked Plaintiff's Exhibit 37 in the accounting action entitled Quittner vs. White; and the portion of this exhibit insofar as it is material is the portion reading as follows: "How much"——

The Referee: Please don't read any part of an instrument. Proceed. [32]

Mr. Weber: Well, we offer to prove that by this exhibit the respondent White admitted that he had 5 months previous experience, that is previous to

July 15, 1947, in the used car business.

I believe that completes the offer.

Just one moment, Your Honor.

We offer further to prove that in partial consideration for the execution of the note from White to Gibbons the note of one Harry Karl was executed and delivered to Gibbons, as a result of which Gibbons gave Herd a credit and applied the Karl note in the sum of \$5,000.00 against the indebtedness that was then due from Herd to Gibbons, and in consequence of which the indebtedness was reduced commensurately.

We further offer to prove that as partial consideration for the execution of the note from White to Gibbons, respondent White also contemplated a possible benefit or participating interest as well as employment security for and on behalf of Dick Allard, his brother-in-law.

The Referee: Anything else?

Mr. Weber: We offer further to prove that the respondent White admitted to one Reed Callister that he expected to receive or hoped to receive as much as a thousand dollars a week out of the auction business or out of the Herd business.

The Referee: Anything else?

Mr. Weber: That the matters which I have proposed and offered to prove took place at or about the time of the [33] transactions between White and Gibbons and that these transactions were all part of a general expectation of a consideration on the part of respondent White in the way of a par-

ticipating interest and other increments flowing from the Herd business to the respondent White.

The Referee: Now, is there anything else?

Mr. Weber: I think that completes it, Your Honor.

The Referee: All right.

Mr. Horowitz: To which we renew the objection which we heretofore made to the prior offer of proof immediately preceding this last offer; and I might say in amplification all that counsel has done has been to call attention to each and every one of the exhibits which was the basis of their action in the state court in the case of Quittner vs. White, which has been adjudicated.

The Referee: The objection is sustained. Proceed.

Mr. Weber: May I inquire whether or not I can excuse a witness by whom I expected to prove some of these matters, Mr. Jack Burkhard, who is in court?

The Referee: You may excuse any witness you want, Mr. Weber.

Mr. Weber: We offer to prove at this time through one Jack Burkhard who is in court——

Mr. Horowitz: Wait a minute. Let's finish the cross-examination of Mr. White.

The Referee: I think so. I gave you an opportunity to [34] state your offer of proof and you said you were through.

Mr. Weber: Except Mr. Burkhard has an engagement at noon and I would like to excuse him.

Mr. Horowitz: We have no objection to excusing

Mr. Burkhard, but you have made your offer of proof. Now are you going to repeat your offer of proof and then repeat it again as to Mr. Callister?

Mr. Weber: That is not the situation at all. I thought in view of him being here all morning——

The Referee: Let me see if I understand you, Mr. Weber. Have you made your offer of proof only as to what you intend to prove by Mr. White or are you making your offer of proof as to what you intend to prove by any and all witnesses?

Mr. Weber: These are the matters which we offer to prove by the respondent White.

The Referee: Very well. Now you want to make an offer of proof as to what you intend to prove by the witness Burkhard?

Mr. Weber: That is right. It will take about 30 seconds.

The Referee: All right, go ahead.

Mr. Weber: We offer to prove by the witness Jack Burkhard, who is here in the court room, that at a meeting at the Hollywood Athletic Club shortly or immediately prior to the execution of the promissory note by Mr. White to Mr. Gibbons there was a discussion concerning participation [35] interests and ownership in the form of a participating interest in favor of White in the Herd business, both auction and retail; that different percentages were discussed with respect to the amount of the percentage, ranging from 25 per cent to 50 per cent, depending on the amount Mr. White ultimately put up or advanced; that those percentages were discussed relative to Mr. White's execution of the

note to Gibbons in order that the Writ of Attachment which Gibbons had executed and levied on assets of Herd might be lifted, and that the purpose of that note as discussed at that meeting was to enable the Herd business to continue to function in order that White might participate in that business and secure to himself certain profits or emoluments therefrom, and that practically every day thereafter Mr. White visited the lot, that is the premises at 7077 Sunset Boulevard, and participated actively in the conduct of the business and participated in discussions with dealers and buyers and so comported himself generally as to indicate a business interest in Al Herd.

The Referee: Anything else? Have you completed your offer of proof?

Mr. Weber: That completes it.

Mr. Horowitz: To which we make the same objection as we did heretofore.

The Referee: Objection sustained. Mr. Burkhard is excused. Anything else? [36]

Mr. Weber: Well, with respect to Mr. Callister, we offer to prove that he was consulted by Mr. White in connection with the formation of a corporation known as Al Herd, Inc.; that he participated in the discussions with one Donn Downen, a member of the California Bar, as to the relative advantages and disadvantages of partnership vs. corporation; that pursuant to Mr. White's instructions he formed Al Herd, Inc., in the early part of June, 1947; that the conversations to which I have referred took place shortly prior to the formation of Al Herd, Inc.; that in those conversations be-

tween Mr. White and Mr. Callister, Mr. White told Mr. Callister of his expectation that he might get as much as a thousand dollars a week in the way of income from the Herd business, and expressed that hope, and that Mr. White told Mr. Callister that a Chicago lawyer consulted by Mr. White had told him that it would be more advisable to go into business with Mr. Herd under a corporate form rather than partnership; that pursuant to Mr. White's instructions Mr. Callister sent an accountant by the name of Dickinson of Los Angeles to the automobile lot of Mr. Herd, with the aim in view of analyzing and examining the books and records of the Al Herd business.

Might I have the Court's indulgence for half a moment?

The Court: Yes.

Mr. Weber: That in a conversation with Mr. George M. Wiener, attorney for Mr. Gibbons—that is, between Mr. [37] George M. Wiener, attorney for Mr. Gibbons, and Mr. Reed Callister, who was then attorney for the respondent White in the promissory note action, to wit, case No. 533,306—Mr. Wiener said to Mr. Callister in words or in substance that Mr. White had offered \$2,000.00 in settlement of the promissory note; that it had been rejected; that the Trustee—or that Mr. Gibbons or his attorney Mr. Wiener was in position to receive from the Trustee in Bankruptcy a credit of \$5,000.00, the amount of the note, on a settlement or on any settlement which might be consummated between the Trustee in Bankruptcy and George L.

Gibbons, which action was then pending in the United States District Court for the Southern District of California.

Mr. Horowitz: To which we make the objection heretofore made.

The Referee: The objection is sustained. Is that all? May Mr. Callister be excused?

Mr. Weber: There may be an abbreviated way of disposing of one more witness.

The Referee: What about Mr. Callister?

Mr. Weber: Oh, he is excused. I beg your pardon.

The Referee: All right, Mr. Callister is excused. Thank you, Mr. Callister.

Mr. Weber: Thanks a lot.

The Referee: Now, you want to abbreviate another witness? [38]

Mr. Weber: Will counsel stipulate that if Mr. Donn Downen were called as a witness he would give the same answers in answer to the questions propounded to him on his examination under Section 21-A, in the 21-A proceeding?

Mr. Horowitz: No. I don't know what they are and I certainly wouldn't stipulate to that at all.

The Referee: Very well.

Mr. Horowitz: And I don't know what the materiality of it is, in addition.

Mr. Weber: The materiality is to show the fact that in these transactions Mr. White was animated by a business interest, and that he did these different things——

Mr. Horowitz: Well, I won't stipulate, counsel.

The Referee: All right. How many more witnesses will you have, Mr. Horowitz?

Mr. Horowitz: We are through, if Your Honor please.

The Referee: How many more witnesses will you have, Mr. Weber?

Mr. Weber: That is about all the witnesses we propose to call.

The Referee: Any more evidence?

Mr. Weber: Oh, there is just one more witness. Just a moment. Excuse me. The offer of proof with respect to Mr. Downen, Your Honor, will be somewhat extended.

The Referee: Well, do you expect to produce him?

Mr. Weber: Well, in view of the Court's ruling— [39] we can produce him, Your Honor, if the Court is going to hear him, but this is matter which the Court has excluded.

The Referee: Well, I don't want you to assume I am going to rule adversely to everything you propose.

Mr. Weber: Well, the ruling of the Court reasonably purports to me——

The Referee: Well, you had better have your witness here because I am certainly not going to stultify myself by saying I am going to rule adversely to you on everything you offer. I will listen to you and make my ruling.

Mr. Weber: No, I am only referring to Your Honor's ruling that these matters are not admissible,

and I thought perhaps there would be no use of getting Mr. Downen down here if the offer of proof could be treated similarly as the other one.

The Referee: No, this Court is human and might change its mind at any moment. Besides, your offer of proof might open up another avenue of thought. If you have any more witnesses please have them here in court at 2:00 o'clock, to which time we will now continue this matter.

But before we do that, let's note in the record that the stipulation withdrawing the claim of Gibbons is now Trustee's Exhibit 15 by reference, and that the proposed amendment to Trustee's Reply to Amended Answer of the Respondent is now Trustee's Exhibit A for identification; and during the noon hour, or will you have a chance, will [40] you gentlemen see whether by sheer inadvertence of course any of you carried away the yellow paper which is——

Mr. Weber: I have it, Your Honor.

The Referee: Oh, here comes a confession right now.

Mr. Weber: I plead guilty and throw myself on the mercy of the Court.

The Referee: It so happens, however, that the original was received in evidence at the first hearing. So they are both here.

All right, two o'clock, gentlemen.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [41]

Tuesday, January 31, 1950—2:00 o'Clock P.M.

The Referee: All right, Mr. Weber.

Mr. Weber: Mr. Wiener.

GEORGE M. WIENER

called as a witness, being first duly sworn, testified as follows:

The Referee: State your name in the record, please.

The Witness: George M. Wiener.

Direct Examination

By Mr. Weber:

Q. Mr. Wiener, you are a member of the bar of the State of California? A. Yes, sir.

Q. Are you a member of the firm of Jones & Wiener of Los Angeles? A. Yes.

Q. Did your firm formerly represent one George L. Gibbons? A. Still do, I think.

Q. From the—did you file an action on his behalf in the Superior Court of Los Angeles County against one Joseph G. White, bearing case No. 533,306?

A. I don't remember the case number but such an action [42] was filed. We filed such an action.

Q. An action on a promissory note for \$5,000.00?

A. Correct.

Q. Do you recall having a conversation with Mr. Reed Callister, attorney for the defendant in that action, on or about April or May, 1948?

(Testimony of George M. Wiener.)

Mr. Horowitz: To which we object on the ground it is incompetent, irrelevant and immaterial, not proper examination, relates to a matter that has already been determined.

The Referee: Well, it is preliminary. Objection overruled. You may answer the question.

The Witness: It would be inaccurate to fix the time of the conversation in any specific month. I could say that I have a recollection some place in that period of having a conversation with Reed Callister.

Q. (By Mr. Weber): And was anybody else present? A. I don't recall. I think not.

Q. Tell us what was said.

Mr. Horowitz: To which we make the objection heretofore made to the former question.

The Referee: Well, of course, I don't know what he is going to say. I will overrule the objection. Go ahead—subject to a motion to strike.

The Witness: I told Reed Callister in substance that the offer of settlement of that action of \$2,000.00 was unacceptable to me, to my client, by virtue of the fact that [43] negotiations were then pending with the attorneys for the bankrupt estate in which the proceeds of our lawsuit would be assigned to the estate at the face value, and therefore we would not be amenable to settling at anything less than face value because it looked like the compromise which was then in negotiation would be the most favorable to my client.

(Testimony of George M. Wiener.)

Mr. Horowitz: At this time we move to strike the answer on the ground it relates to an issue that has already been determined here.

The Referee: Motion granted.

Q. (By Mr. Weber): Now, do you recall a meeting in May of 1947 at which Mr. Joseph G. White was present, in which the promissory note bearing date of May 19, 1947, was discussed?

A. I have no way of fixing the date, counsel. The occurrence that you mention actually occurred in my office.

Q. I show you a photostatic copy of a promissory note dated May 19, 1947, executed by White to Gibbons, and ask you whether you recall a conversation in your office shortly prior to that date at which Mr. White was present?

A. It may have been either shortly prior or on that date.

Q. Who else were present?

A. Mr. White, Donn Downen, and myself, as far as I recollect now.

Q. Where did the conversation take place? [44]

A. In my office at 711 Banks-Huntley Building.

Q. Was anything said in connection with the purpose or reason for the execution of that note to Mr. Gibbons? A. Yes.

Q. What was said?

A. The conversation was related by either Mr. White or Mr. Downen, I don't recall which, to me, that upon my accepting that note in return for release of the attachment that we then had against

(Testimony of George M. Wiener.)

Al Herd there was a possibility that we would get paid our principal claim in full, and that Mr. White would proceed with his business arrangements with Mr. Herd subject to the Morris Plan going through with their deal, which we had upset or impeded by filing our lawsuit and the collateral writ of attachment.

Q. Did Mr. White say anything in that conversation about the type or extent or nature of the interest he was to have?

Mr. Horowitz: Just a moment. We will object to that as—on the ground that this witness has testified he didn't recall at this time whether Mr. White was present or whether the conversation was with Mr. White or whether this was a conversation that he had with Mr. Donn Downen.

Q. (By Mr. Weber): Was Mr. White present at this conversation? A. Yes, sir.

The Referee: Do you still urge your [45] objection?

Mr. Horowitz: No, Your Honor, if the witness says he was present.

The Witness: Yes, counsel, he was present with Donn Downen. I don't know if anyone else was present. The three of us were present.

Mr. Weber: Will you repeat my last question, Mr. Reporter?

(Record read.)

The Witness: Mr. White said he was going into business with Al Herd but I have no recollection

(Testimony of George M. Wiener.)

of the nature, extent or type of business relationship between Mr. White and Mr. Herd.

Mr. Weber: That is all.

The Referee: Cross-examine.

Cross-Examination

By Mr. Horowitz:

Q. Mr. Wiener, as I understand the situation, you or your firm on behalf of Mr. Gibbons had filed an action against Al Herd and as a part of that action had levied a Writ of Attachment against certain assets of Mr. Herd?

A. That is correct.

Q. And the question then came up as to whether or not you would release the Writ of Attachment; is that not right?

A. And dismiss the lawsuit.

Q. And dismiss the lawsuit? [46]

A. Yes. That is correct.

Q. And a suggestion was made that Mr. White would give a note to Mr. Gibbons on behalf of Mr. Herd for \$5,000.00?

A. Well, now, I don't know if it was on behalf of Mr. Herd. Mr. White was to give—Mr. White and Mr. Karl were each to give us a promissory note for \$5,000.00. Mr. Herd also gave us a promissory note for 19 or 20 thousand dollars.

Q. Now, was Mr. White present at the time the note was given to you?

A. At the time the note was handed to me?

Q. Yes. A. Yes.

(Testimony of George M. Wiener.)

Q. Well, now, don't you recall that Mr. White was not present and because he was not present you had Mr. Donn Downen sign as a witness to the note? Do you recall that now?

A. No, that is not correct. I recall distinctly why Mr. Downen witnessed it.

Q. And why did Mr. Downen witness it?

A. Because when the note was handed to me it had already been signed by Mr. White and I didn't know Mr. White's signature and I asked for a witness.

Q. And you say Mr. White was there at that time?

A. To the best of my recollection he certainly was.

Q. And you never asked—you could have asked him if [47] that was his signature, couldn't you?

A. Yes, I could.

Q. But you didn't ask him if that was his signature?

A. Oh, yes, I asked him, and then Donn Downen said he had seen him sign it and he would sign it as a witness.

Q. Don't you recall in the State Court action, in which you were also a witness, that this same subject was brought up and you recalled at that time that the note was given to you in the absence of Mr. White and that was why you wanted Mr. Donn Downen to sign it as a witness?

Mr. Weber: I object to it as an improper form of examination. If he has given testimony at vari-

(Testimony of George M. Wiener.)

ance with what he is now giving he has to be confronted with that testimony.

The Referee: Overruled.

The Witness: I don't recall that, counsel. My memory is not too good on these issues, and I certainly don't want to misstate anything. If Mr. White was not present at the time this note was delivered he was present the day before or earlier in the day, or two days before, or almost simultaneously with the execution of this note, at which time the conversation occurred which I have just related.

Q. (By Mr. Horowitz): Then you don't recall the conversation in detail that you related?

A. There were so many of them that I cannot, counsel.

Mr. Horowitz: I think that is all.

Mr. Weber: Just one question, Mr. Wiener. [48]

Redirect Examination

By Mr. Weber:

Q. At the time the Karl transaction was mentioned who were present, do you recall?

A. Well, I know Donn Downen was present but I don't recall if Mr. White was present or not.

Q. And at the time the Herd note of \$20,000.00 was mentioned who were present, if you recall?

A. Well, you ask me that question—you ask your question in a form as though there were just one meeting at which the Herd note was mentioned.

(Testimony of George M. Wiener.)

The Herd note and the White note and all the notes were mentioned at meeting after meeting, a long series of negotiations.

Q. In any event, these three notes were all jointly discussed?

A. They were all part of one transaction, that is right. •

Q. And at that time the indebtedness of Herd to Gibbons was approximately how much?

A. I have my file here.

Q. Can you tell us from looking at that file approximately what the indebtedness was?

A. If I may have that.

Mr. Horowitz: We will object to that. I don't see any relevancy to what the indebtedness was.

The Referee: Sustained. Proceed.

Q. (By Mr. Weber): Now, at the time the note was delivered [49] to you, that is the note for \$5,000.00 from Mr. White to Mr. Gibbons, at any conversation at which Mr. White was present in connection with the subject matter of that note did Mr. White personally say anything about the attachment interfering in his plans or with his plans to go into business with Mr. Herd?

A. Yes, he did.

Mr. Weber: That is all.

The Referee: Cross-examine.

(Testimony of George M. Wiener.)

Recross-Examination

By Mr. Horowitz:

Q. Mr. Wiener, did Mr. Donn Downen tell you that he was the attorney for Mr. Herd?

A. Yes, sir.

Q. Now, you say there was meeting after meeting after meeting. What is your best recollection of the number of meetings that took place?

A. Well, you understand I had meetings with Reed Callister on behalf of the Morris Plan, with Dan Weber and Marvin Wellins, with Donn Downen and Mr. White, with Al Herd, constantly. I should say over a period of two weeks I was having a meeting or two every day.

Q. Now, can you precisely specify a particular meeting at which a particular thing was said where particular parties were present? [50]

A. Yes, I can. I can fix a meeting where Mr. Herd was present, Mr. White was present, and Donn Downen was present.

Q. And when was this?

A. That was a few days before the execution of the promissory note by Mr. White.

Q. And what other conversation do you remember with particularity?

A. Well, counsel, if you could pinpoint your question a little bit maybe I could recollect a meeting on the point you are interested in, but we had meetings on every possible phase of this. We met with the Morris Plan people, we met with Mr.

(Testimony of George M. Wiener.)

Herd and his representatives right along to see if the matter could be settled without all the parties sustaining a loss, which seemed to be imminent.

Q. You were particularly interested in getting the \$10,000.00 on behalf of Mr. Gibbons?

A. No, I wanted a good deal more than that.

Q. Well, at least \$10,000.00 on behalf of Mr. Gibbons?

A. As far as that goes, that is accurate, yes.

Mr. Horowitz: That is all.

Mr. Weber: That is all.

The Witness: May I be excused, Your Honor?

The Referee: Yes, you may be excused. The next witness.

Mr. Weber: We left a call for Mr. Downen. I guess he [51] isn't here.

The Referee: Anything else?

Mr. Wellins: We would like to complete our cross-examination of Mr. White, Your Honor.

The Referee: You completed it once.

Mr. Wellins: No, these other witnesses I believe were here in court. We had Mr. Callister, and there were some offers of proof.

The Referee: All right, come along, Mr. White.

JOSEPH G. WHITE

recalled for further cross-examination, having been previously duly sworn, testified further as follows:

Cross-Examination

(Resumed)

By Mr. Wellins:

Q. Mr. White, referring to the date upon which you gave this promissory note for \$5,000.00 to Mr. Gibbons, you knew at that time that Mr. Harry Karl was also giving a \$5,000.00 note to Mr. Gibbons, at the same time? A. Yes.

Q. And referring to the \$30,000.00 note that you received on May 21st from Al Herd, tell us how that sum of \$30,000.00 was arrived at.

A. Well, I signed a \$25,000.00 note for Mr. Herd to the Morris Plan Bank and I signed a \$5,000.00 note for Al Herd to Rusty Gibbons, and so I think it was within a few [52] days I told Mr. Herd, I said, "Listen, I signed \$30,000.00 worth of notes for you, I have nothing to show for it"; so he said, "Well, I will give you a note so in case anything happens to me you are holding that, but," he said, "just as soon as I pay that \$5,000.00 to Rusty Gibbons, that \$5,000.00 note, in turn you give me this back and I will reduce that note."

Q. All right. Now, you arrived at the \$30,000.00 sum on the note Mr. Herd gave you by adding the amount of the \$5,000.00 on the note that you gave to Mr. Gibbons to the \$25,000.00 note you gave to the Morris Plan; is that correct?

A. That is correct.

(Testimony of Joseph G. White.)

Q. At the time you received the \$30,000.00 note, or about that time, you also received an assignment from Al Herd in the form of—do we have an exhibit number, Your Honor, on this assignment?

Mr. Horowitz: That is already in evidence.

Mr. Wellins: I'm trying to get the number on it.

The Referee: Do you mean this one to be photostated?

Mr. Wellins: Yes.

The Referee: No, we haven't assigned any number and won't until it comes in.

Q. (By Mr. Wellins): You received an assignment from Al Herd in the form of the document I now show you; is that correct? [53]

Mr. Horowitz: What date is that?

Mr. Wellins: May 21, 1947.

The Witness: That is right.

Mr. Wellins: If the Court please, I do not know what the state of the record is in regard to an offer of this particular document in evidence. Therefore, I make a formal offer of it at this time. It is an assignment dated May 21, 1947. It now bears the marking, Plaintiff's Exhibit 26, in the prior Superior Court action of Quittner vs. White, and we ask leave to substitute a photostatic copy for the original.

Mr. Horowitz: That has already been made. I mean such an offer has already been made.

Mr. Wellins: Has it been made?

Mr. Horowitz: Yes. It is already in.

The Referee: May I see it?

(Testimony of Joseph G. White.)

Mr. Wellins: Yes, Your Honor.

The Referee: All right.

Q. (By Mr. Wellins): Mr. White, on the date of the petition in bankruptcy here, August 6, 1947, you had not paid any of the money to Mr. Gibbons on that \$5,000.00 note of May 19, 1947, had you?

A. No.

Mr. Horowitz: We will stipulate that he had not. He didn't pay anything on it until after the summary judgment was obtained and the Writ of Execution was issued. [54]

Mr. Wellins: And that was in about December, 1948?

Mr. Horowitz: Yes.

The Referee: The date is immaterial. Go ahead.

Mr. Wellins: May I have a moment, Your Honor?

The Referee: Yes.

Q. (By Mr. Wellins): Mr. White, you also knew, did you not, that at the time you gave this \$5,000.00 note to Mr. Gibbons not only did Mr. Karl give a \$5,000.00 note to him but Mr. Herd also executed a new note to Mr. Gibbons in the sum of \$20,500.00?

Mr. Horowitz: To which we object as immaterial.

The Referee: Sustained. Proceed.

Mr. Wellins: No further questions.

Mr. Horowitz: Just one question.

(Testimony of Joseph G. White.)

Redirect Examination

By Mr. Horowitz:

Q. Mr. White, calling your attention to this assignment of reserves, so-called, to the Morris Plan, did you ever get as much as one cent on account of those so-called reserves?

A. No. The Morris Plan Bank told me that reserve was wiped out.

Q. So you never got as much as a penny?

A. No, sir.

Mr. Horowitz: All right, that is all. [55]

The Referee: Any other questions of Mr. White?

Q. (By Mr. Wellins): Your information in the last answer as to whether or not you got any money on that account is based on what the Morris Plan told you? A. That is right.

Mr. Wellins: I move to strike the answer as a conclusion of the witness, not the best evidence.

The Referee: The motion is denied. He made demand for the money and they told him they didn't have any. It is competent evidence.

Anything else?

Mr. Horowitz: That is all.

Mr. Wellins: We submit that there is no evidence of that, Your Honor.

The Referee: Anything else, gentlemen? Anything else from this witness?

Mr. Horowitz: That is all, Mr. White.

Mr. Wellins: Just a second, if the Court please. No further questions.

The Referee: All right, anything else, Mr. Horowitz?

Mr. Horowitz: No, we rest, if Your Honor please.

The Referee: All right, proceed, gentlemen.

Mr. Weber: There are a few matters in the record we would like to correct. There is a minor one in respect to the date of the Trustee's reply. We would like to amend the date appearing in line 17 on page 2 of the Trustee's reply [56] to read the 13th day of April, 1948.

The Referee: Instead of the 29th day of December, 1948?

Mr. Weber: That is correct. The true date from the evidence, the document has been marked, I believe, is April 13, 1948.

The Referee: Any objection, gentlemen?

Mr. Horowitz: Is that the correct date of the garnishment?

Mr. Weber: Yes, that is the correct date of the garnishment.

Mr. Horowitz: If that is the correct date, we have no objection.

Mr. Weber: That is the date of service.

Mr. Horowitz: Yes, all right.

The Referee: All right, by interlineation the date, the 29th day of December, 1948, line 17, page 2 of the Trustee's reply filed January 25, 1950, is changed by the Referee to the 13th day of April, 1948.

Mr. Weber: In the present state of the record

I am not clear as to whether the Trustee's Exhibit 3 includes the notice to creditors dated May 6, 1948. It may be Exhibits 2 or 3 that include that, and I would like to make sure that that is among the papers so marked.

The Referee: Trustee's Exhibit 2 by reference is certificate of mailing the papers attached thereto, filed May [57] 6, 1948. Does that answer your question?

Mr. Weber: Yes. I inquire whether it includes, however, the notice to creditors dated May 6, 1948?

The Referee: The papers attached to the certificate of mailing are notice of hearing trustee's petitions to compromise controversies and a tabulation of the number of notices required to be sent.

Mr. Weber: Specifically does that include the notice dated May 6, 1948, in connection with the Gibbons compromise?

The Referee: Well, it is a notice dated May 6, 1948, captioned "Notice of Hearing Trustee's Petitions to Compromise Controversies." One of the controversies involved is George L. Gibbons.

Mr. Weber: Thank you, Your Honor.

In reading the transcript of the last hearing I note that we inadvertently did not ask Mr. Wellins a question concerning the conversation that took place at the time of the execution of the receipt which was the subject matter of the testimony of Mr. Howard, and we would like to recall Mr. Wellins to supply that inadvertent omission.

The Referee: All right, Mr. Wellins.

MARVIN WELLINS

recalled, having been previously duly sworn and examined, testified further as follows:

The Referee: Be seated, Mr. Wellins. You have been [58] sworn.

Direct Examination

By Mr. Weber:

Q. Mr. Wellins, do you recall a conversation that took place at the time of the execution of the receipt dated December 14, 1948, which has been received in evidence here? A. Yes.

Q. And where did that conversation take place?

A. It took place at my office which was then located at 417 South Hill Street, Los Angeles.

Q. Who were present?

A. I recall Mr. Howard being present and I recall Mr. White. I also recall hearing in court here——

The Referee: Let's not go over the whole thing. You certainly forget to ask that question, did you? You said you forgot to ask one question. You are starting all over again with the whole conversation.

Q. (By Mr. Weber): Tell us what was said.

Mr. Horowitz: Just a moment. I understood——

Mr. Weber: My recollection is I didn't ask him about the conversation at all, hence the preliminary inquiry with respect to the time, place and persons present.

The Referee: You are saying now you didn't examine Mr. Wellins about the conversation he had

(Testimony of Marvin Wellins.)

with Mr. Howard at the time of the execution of the receipt?

Mr. Weber: I don't recall—— [59]

The Referee: You have a transcript here, gentlemen.

Mr. Weber: I don't recall whether I did or not.

Mr. Horowitz: Of course that matter was gone into.

The Witness: I do not believe that part was gone into.

The Referee: What part?

The Witness: The conversation at the time of the receipt. The only conversation I testified to was the conversation with Mr. Horowitz, not that conversation.

The Referee: Well, let's find out. We have a long record. Let's not make it any longer if we can help it.

Mr. Horowitz: Mr. Howard tells me he didn't testify about that conversation.

The Referee: I'm sorry, Mr. Weber. Go ahead if you want to.

Q. (By Mr. Weber): Who were present, Mr. Wellins?

A. I recall Mr. White and Mr. Howard being there. I do not specifically recall whether Mrs. White was there.

Q. What was said?

A. Mr. Howard said that he and Mr. White had come to pay the money on the case of Gibbons vs. White and that they had brought with them one

(Testimony of Marvin Wellins.)

check for \$5,000.00 and that they would give me another check for the additional amount due to complete the payment, and Mr. Howard asked whether we would deliver to him at that time a satisfaction of judgment. I said no, we would not, we would wait until the checks had cleared before anything of that sort was done, [60] but we would give him immediately a receipt for the two checks he was about to deliver to me. I then called in my secretary and I dictated a receipt in the form which is here in evidence, in the presence of Mr. Howard and Mr. White.

There was further conversation about the amount of court costs that had been incurred, and as the last sentence of the receipt indicates there was an arrangement made with regard to that if they should turn out to be more than the amount given in the check. The form in which I dictated the receipt is the form in which it now appears. The girl typed it up, brought it in, I signed it, Mr. Howard handed me a check for \$5,000.00 and another check for \$1220.00, and that was the end of the conversation. He and Mr. White then left. If Mrs. White was there she left, too.

Q. Was the subject of attachment discussed at all?

A. No, the subject of attachment was not discussed at all.

Mr. Weber: No further questions.

The Referee: Cross-examine.

(Testimony of Marvin Wellins.)

Cross-Examination

By Mr. Howard:

Q. Mr. Wellins, don't you remember a discussion between us about the garnishment or attachment that had been served upon Mr. White? [61]

A. Absolutely not. The only reference to anything that we discussed is contained in the wording of that receipt as I dictated it in your presence.

Q. How did it happen then that you signed as attorney for Mr. Gibbons and as attorney for the Trustee?

A. Because as you well knew I was attorney for Mr. Gibbons and attorney for the Trustee.

Q. And there was no discussion as to the fact that you would sign in both capacities?

A. The only discussion of it was my out-loud dictation of it in your hearing as contained in the receipt.

Q. That was not a discussion. Is your answer that there was no discussion of it at all?

A. No discussion of it whatever.

Mr. Howard: I have no further questions.

The Referee: Any further questions?

Mr. Weber: That is all.

The Referee: Call your next witness. Which one of you—will one of you gentlemen let me have the transcript of last Friday's proceedings?

Anything else, gentlemen?

Mr. Weber: I would like to identify, in order that I may introduce photo copies of the exhibits

which were offered this morning, the particular exhibits that were offered and ask leave of Court to substitute photo copies of the exhibits which were offered; and is it the desire of the Court [62] that they not receive exhibit numbers at this time until they have been physically filed?

The Referee: Those you offered in connection with your offer of proof of course will not be received as exhibits. I don't think it is necessary to encumber the record by having photostats supplied and having them marked as Trustee's exhibits for identification. They are sufficiently identified in the record here so if the Court should overrule the Referee on his ruling there isn't any question what you were talking about. The only purpose of marking a paper for identification is so it may be identified so we know what you are talking about.

Mr. Weber: We ask that the following documents be marked for identification: The exhibit dated May 21, 1947, the assignment from Al Herd to Mr. White.

Mr. Horowitz: That is in evidence.

Mr. Weber: Is that in evidence? I beg your pardon.

The Referee: Is it?

Mr. Horowitz: Yes.

The Referee: You mean it was one we have given permission to photostat and put in evidence?

Mr. Horowitz: Yes, at least twice that permission was granted.

The Referee: Well, now, gentlemen, the only

thing I can do to shorten this situation, counsel for the Trustee will prepare photostats of those instruments which have been [63] received in evidence and will designate those photostats as being in evidence, and one or the other of counsel will please take them to Mr. Horowitz's office and have Mr. Horowitz and Mr. Howard certify that those instruments are to go in evidence if there is no question about it. Then in addition to that, any instruments that you have referred to here in your offers of proof you may have photostats made and mark those to be marked exhibits for identification. Also take those to Mr. Horowitz and Mr. Howard so there may be no misunderstanding. I am sure no one can complain about a paper being marked for identification. That doesn't mean anything at all.

Mr. Weber: We offer in evidence at this time the entire transcript of the proceedings in this Court pursuant to Section 21-A of the Bankruptcy Act.

The Referee: That is much too indefinite, counsel. You will have to get it down to specific examinations of specific persons on specific days.

Mr. Weber: We offer in evidence the testimony given by Joseph G. White, the respondent in this proceeding, in the 21-A proceedings in this court appearing on page 88 or commencing on page 88 of the transcript of proceedings held on August 11, 1947, and ending at page 138 of said transcript, and pages 235 to 247, inclusive, of the transcript of the testimony of Joseph G. White, and the further testimony of Mr. White— [64]

The Referee: Take one thing at a time, sir.

Mr. Horowitz: To which we object, if Your Honor please, on the ground that it is incompetent, irrelevant and immaterial. We have before us in this particular proceeding certain pleadings and certain issues which are relevant to those proceedings; and we will object on that ground, that just general testimony is immaterial.

The Referee: Well, Mr. Weber, upon what ground do you think you can get those transcripts in evidence here?

Mr. Weber: Well, I offer in evidence the entire transcript upon the ground, No. 1, as evidence of the facts of which Mr. Horowitz had knowledge in his capacity as attorney and agent for Mr. White. This entire transcript was in his possession for a number of weeks prior to the time of the settlement or the substitution of attorneys Horowitz and Howard for Cannon & Callister. These transcripts were in his custody and control a number of weeks; and they are offered for showing the facts which Mr. Horowitz as the agent of Mr. White had knowledge of and is chargeable with.

We offer them upon the additional ground that the allegation of the amended answer filed by respondent White is to the effect that we had knowledge of—strike that.

They are offered on the additional ground as indicating the factual basis upon which the Trustee in Bankruptcy herein acted.

Mr. Horowitz: That is objected to upon the ground it—— [65]

The Referee: I will sustain the objection, Mr. Weber. If there is anything in those transcripts that impeaches any testimony given by Mr. Horowitz as to any lack of knowledge on his part as to matters that we are concerned with here, you should have confronted Mr. Horowitz with the transcript at the time he was on the stand.

Now, I think you gentlemen all ought to have some regard for the courts that have to deal with this problem. We have here a specific lawsuit and we are concerned only with the issues in that lawsuit. We are not trying the general case of Al Herd, bankrupt.

Now, as a judge I have a duty to listen to all of the evidence that is offered from the witness stand and to read all of the documentary evidence that comes in, and if you want to get those transcripts in evidence before I could decide this case I would have to go into my chambers and I would have to read every word of those transcripts; and one party or the other is going to be aggrieved by my decision here. That is certain. I can't decide it to please both of you; and the aggrieved party, because of the amount involved, whichever one of you it may be, may well take a review, and the entire record has to go up to the judge on review and the judge on review will have to read the entire record, including all of the exhibits.

In the first place, I don't think it is a proper way to get the evidence in. Secondly, I don't think you have [66] shown sufficient grounds to burden

and encumber this already lengthy record with the voluminous transcripts that you now offer.

The objection is sustained.

Anything else, sir?

Mr. Weber: Just one moment. I think we are through.

I would like to supplement one offer of proof that was made last week. We offer further to prove in connection with proceedings in the action entitled Quittner vs. White in the Superior Court that in that action Mr. White contended as a matter of defense and testified that he was not a partner and that he was a lender or creditor of Mr. Herd, and as evidence of that claim he introduced the promissory note of \$30,000.00 executed by Mr. Herd to Mr. White dated May 19, 1947, and which has been introduced in evidence here.

Mr. Horowitz: To which we object on the ground that it is incompetent, irrelevant and immaterial.

The Referee: Sustained. Proceed. Anything else?

Mr. Weber: We rest.

Mr. Horowitz: We rest, if your Honor please.

The Referee: All right, then, gentlemen, we are all through so far as the evidence is concerned. I have already ruled on all of these special defenses which are before us except the last one, and I have already said that I think that the ruling on that will have to be made on the same ground that the ruling on the case in chief may be made. [67]

I don't propose to go over any of those special defenses except to simply say this, that I don't want

anybody to feel that I have been unnecessarily harsh or technical or inelastic on these rulings on special defenses. If it may appear to same that I have been, I simply want to say by way of explanation that I have a fundamental philosophy that every person is entitled to a day in court in order to test any position that he has any reasonable ground to take; and that is my feeling here. Mr. White has the right to submit to this Court his claim that the Gibbons note is not enforceable against him in the hands of the Trustee in Bankruptcy of Al Herd.

Now, there isn't any question that Mr. Weber and Mr. Wellins were conscious of the fact that Mr. White might take that position, and so as good servants of the Trustee of the bankruptcy estate they tried to plan their strategy so that he would not be in a position to make any claims such as he is making here.

I do find as a matter of fact here that Mr. Gibbons did assign and transfer to the Trustee in Bankruptcy all of his right, title and interest and ownership in and to the White note to Mr. Gibbons, but I find that the attorneys for the Trustee in carrying out their plan of action deemed it advisable not to accept formally that kind of an assignment. They chose rather to take the assignment of the proceeds because they believed that from a legal standpoint they would [68] be better off simply to have the assignment of the proceeds rather than that which they were entitled to and which in effect they got or in fact they got from Mr. Gibbons, namely, the transfer of all of his interest in the note.

Now, we have this rather interesting development here. Although Mr. Weber and Mr. Wellins planned their case so that Mr. White couldn't claim an offset, nevertheless they now want this Court to hold that Mr. White nevertheless could have done that very thing because he knew all about it.

Well, I don't think, gentlemen, that Mr. White knew all about it. There has been a lot of evidence here pro and con, and we have had more lawyer witnesses here than I think we have had in many a case and many a day, and they haven't agreed as to some of the things that were said.

Well, now, I'm not going to pick and choose between lawyers who were on the stand, trying to find out definitely what was said and what was not said.

I don't know how much Mr. White himself knew, but Mr. White is a lay person and wouldn't necessarily know what rights he might have or what privileges he might have under a given set of facts. I am entirely satisfied that Mr. Horowitz and Mr. Howard did not understand that the Gibbons note was owned in toto by the Trustee in Banruptcy at the time of the summary judgment, and I say that for this reason, not so much because of anything that has been said on this witness stand but because of the fact that Mr. Howard and [69] Mr. Horowitz are now vigorously asserting this claim of Mr. White, and for some months past they have been giving notice of their intention to make such an assertion. They did, at least so I understand the record, make a vigorous effort to prevent a summary judgment by the filing I think of affidavits

and things of that kind. Certainly if they had understood at the time that the Trustee in Bankruptcy was the full and complete owner of this note that they were trying to contest they would have raised the issue that they have raised here.

Now, the only other conclusion that I could come to would be that they overlooked it, that it didn't occur to them, and I'm not going to do that. I am satisfied that if they understood then what they understand now that they would have urged the same issue there on behalf of Mr. White that they are urging here.

So now that disposes of the technical side of the case, and I don't want Mr. Wellins or Mr. Weber to get the impression that the Court is in any way critical of them. I'm not. I think they acted here as good lawyers. They looked at it purely from the legal standpoint. I don't think they did anything affirmatively with the intent to deceive Mr. White or his counsel. They were aware of the fact that Mr. White held this \$30,000.00 note and they planned their case so that he wouldn't have an opportunity to assert any offset against the Gibbons note. I want to make that very clear. [70] I don't criticize them. I don't think they should be criticized and they were indulging in legal strategy, for which they certainly should not be condemned.

Now, getting down to the merits of the situation here, I don't think that we can exactly call this Gibbons note an accommodation note for this reason, that Mr. White did get something in exchange for the Gibbons note. He got from Mr. Herd a prom-

issory note for \$30,000.00, and it is stated that the reason for giving the \$30,000.00 note was because Mr. White had signed the Gibbons note for \$5,000.00 and a note I think to the Morris Plan for \$25,000.00.

Now, I am not saying that there was any intention at all that that note should be payment of the debt from Herd to White, which debt arose by the giving by White of the \$5,000.00 note and the \$25,000.00 note. It was simply an evidence of that indebtedness, but nevertheless it is something. Now, what I mean to say is this: Assuming that Mr. Herd had gotten possession of the \$5,000.00 Gibbons note and owned it. He couldn't ordinarily enforce that against White if we make the finding, as we must make the finding from the evidence, that White received nothing for the Gibbons note except Herd's note. Herd couldn't enforce the \$5,000.00 note against White because when White gave Herd the \$5,000.00 note Herd thereupon became indebted to White. So the one would offset the other. But since Herd gave White a note, if White no longer owned that note, then Herd could [71] enforce the \$5,000.00 Gibbons note against White. I don't know if I make myself clear or not. If Herd had not given any kind of an evidence of indebtedness to White, and Herd had become the owner of the Gibbons note, if he sued White on the note White would simply plead the offset of Herd's indebtedness to him; but since Herd gave White a note before White could resist Herd's suit on the Gibbons note White would have to come forward with Herd's

note. If he had sold it, if he had disposed of it, if he had negotiated it, there would still be an obligation on the part of Herd. There could be no offset.

So that would be the situation as I see it, if Herd had gotten possession of the note.

Now we come down to the real situation. That never happened. Herd never became the owner of the Gibbons note, the note of White to Gibbons.

At the time of bankruptcy White held Herd's note for \$30,000.00. He had not disposed of it. He had not transferred it. He had not sold it. He had not negotiated it. He still had it. Gibbons had White's note for \$5,000.00. \$5,000.00 of the \$30,000.00 note from Herd to White was in consideration of White's note to Gibbons for \$5,000.00.

That was the situation at the time of bankruptcy. At the moment of bankruptcy, at the moment of the filing of the petition in bankruptcy, all of Herd's assets become vested in a Trustee in Bankruptcy who at that moment was unknown but [72] would later be appointed in the person of Francis F. Quittner; but I emphasize that which you all know, and that is this, that at the moment of bankruptcy, and that is defined to be the date of the filing of the petition in bankruptcy, which I think in this case was petition in involuntary bankruptcy; but regardless of that fact, at that moment title to all of Herd's assets then owned by Herd passed to the Trustee in Bankruptcy.

Among the assets which passed was a claim against Gibbons for usury. After bankruptcy the Trustee sued Gibbons on a number of counts. I im-

agine mostly—or most of the counts were based on usury. One of the counts was to recover the \$5,000.00 note, or \$5,000.00 White to Gibbons note, upon the ground that it was a voidable preference. A settlement of that litigation was made. In that settlement Gibbons paid Mr. Quittner \$3,000.00, or agreed to pay him \$3,000.00, and assigned his entire ownership in the White note for \$5,000.00.

Now the question is can Mr. White offset his liability on that \$5,000.00 note by his \$30,000.00 note? Let me put it this way: All of Herd's assets passed to Mr. Quittner, the Trustee. Gibbons held the White note. Herd had no right in it or to it at the date of bankruptcy. Supposing that Gibbons had purchased automobiles from the Trustee in Bankruptcy. Supposing at the time of bankruptcy Herd had 10 automobiles. Title vested in the Trustee. He sold them [73] to Gibbons. Gibbons paid for them with the \$5,000.00 note. Could White assert an offset against that note in the hands of the Trustee?

Now, Mr. Quittner did not sell tangible assets to Mr. Gibbons but he did have a cause of action against him for usury which he had acquired from Mr. Herd. In payment of that cause of action as a compromise Mr. Gibbons in part satisfied his obligation by transferring the \$5,000.00 note. Under the circumstances, can Mr. White offset?

The preferential portion of the Trustee's suit against Gibbons is interesting. Supposing that had been the only suit against Gibbons. Supposing usury wasn't in it at all, the Trustee simply sues Gibbons

to get back this \$5,000.00 note and succeeded. What would the situation then be? That would not be payment for an asset such as automobiles sold by Mr. Quittner to Gibbons. It would not be in payment of a cause of action owned by Quittner against Gibbons. It would be simply bringing back into the estate something that had been taken from the estate contrary to the laws as set down by Congress in the act of Congress relating to bankruptcy.

Well, in the first place, I don't think that Mr. Quittner would have succeeded because the Trustee I believe perhaps would have been unable to show any diminution of assets by the Gibbons note because let us say there was no other indebtedness on the part of Herd at the time, that is at the time he owed Gibbons \$5,000.00. After the transaction was [74] completed he didn't owe Gibbons anything any more but he owed White \$5,000.00. So it is very doubtful according to my view of it that Mr. Quittner could have—that Mr. Quittner as Trustee could have prevailed in a naked preferential action.

But in any event, the \$5,000.00 note and the \$3,000.00 in cash were not given by Gibbons to Quittner solely in satisfaction of the cause of action based upon a voidable preference. It was given to settle the entire lawsuit, and I don't think that the preferential end of it, for that reason and for the other reasons I have given can have much influence.

So now, gentlemen, I am going to take a recess and when I come back I want your views on this legal situation. Although Mr. White could have asserted the note in his possession as an offset

against a suit by Herd outside of bankruptcy on the Gibbons note, can Mr. White claim that same offset against a suit by Herd outside of bankruptcy on the same note under the circumstances through which the Trustee became the owner of the note.

Let's take the recess.

(Recess.)

The Referee: All right, Mr. Horowitz and Mr. Howard, have you any views on the matter?

Mr. Howard: If the Court please, we would like with your permission to address ourselves briefly to the question [75] of the accommodation phase of the case, if we may.

The Referee: Yes, certainly.

Mr. Howard: The Court will notice that the note which was received, the \$30,000.00 note which was received, is a non-negotiable note. It states on its face that any payments made out of the Morris Plan Bank reserve are to be credited on the note. The Court will recall the circumstances under which the note was given, that is White had given a note for \$5,000.00 to Gibbons and a note for \$25,000.00 to the Morris Plan Bank, and a few days thereafter had said to Herd that something—"If something should happen to you I have nothing to show for this transaction." Whereupon, Mr. Herd said, "Well, I will give you this note." The note was in effect a receipt, simply being evidence of the fact that White had accommodated Herd to the extent of \$30,000.00. The most that could be said would be the note was secured so that in any event Herd did not

pay White but just for evidence of the obligation of Herd to him.

The law is, if the Court please, that where security is given, not only a note but tangible physical assets to the accommodating party, that nonetheless it is an accommodation transaction.

In that connection I would like to call the attention of the Court to the case of *Brown vs. Volz* in 90 A. C., in the advance sheets, at page 973.

The Referee: What is that citation again? [76]

Mr. Howard: 90 A. C. A 933, *Brown vs. Volz*.

The Referee: Yes.

Mr. Howard: In that case a very old woman purchased a house and the seller was not willing to accept her obligation alone, so she had a friend of hers become an accommodation maker on a note that was given for the house. The friend loaned her credit, and the accommodation maker received in exchange an interest as a joint maker—I mean as a joint tenant in the property. The deed was made to both of them. She received a present one-half interest in the real estate to protect her in the transaction.

The Court states:

“As between the parties the status of defendant on the note was that of an accommodation maker,” as in this case.

They then go on to describe an accommodation maker as a party who signs an instrument as maker, drawer, acceptor, or endorser, without receiving value therefor and for the purpose of lending his name to some other person. “Without receiving

value therefor” has been construed to mean without receiving value for the paper, for the instrument itself. They may receive some value for lending their name as credit without destroying the accommodation nature of the transaction.

Again quoting, the Court says:

“Parol evidence is admissible to show that the maker of a note is, in fact, an accommodation maker and the evidence is limited to those cases in which there was no consideration [77] passing, for otherwise the maker could not be an accommodation maker under the statute. A loan of credit is the universal test of the character of accommodation paper.”

In other words, was there a loan of credit? The fact that an accommodation party has taken security for the loan of his credit does not prevent him from being an accommodation party, for in order to constitute a valid consideration the accommodation party must receive something else than the mere chance of not losing if he is called on to pay the instrument.

May I emphasize that? For in order to constitute a valid consideration the accommodation party must receive something else than the mere chance of not losing if he is called on to pay the instrument.

In the one case the accommodation party received a present one-half interest as a joint tenant in the real estate. In this case much less than that was received. The accommodating party received this document, a non-negotiable note, which was received by him from Herd with the understanding that was simply evidence of the transaction which had taken

place and not with the intention of changing the nature of that transaction.

If the Court please, the evidence is that White loaned his credit to Herd to the extent of \$30,000.00 without receiving anything other—anything for the loan of his credit. [78]

The Referee: I don't want to interrupt your train of thought, except this, in the security case that you mentioned the accommodation maker of course would have to give up the security when his obligation on the accommodation paper was extinguished; is that correct?

Mr. Howard: Yes.

The Referee: All right. Now, also, why do you call this note of Herd to White non-negotiable?

Mr. Howard: Because of the fact that on its face it is tied into a contingency upon another transaction. If the Court please, a person who became the recipient of this note for its face value, if there had been payments he would be subject to them because on its face the note shows that it is tied into a transaction with the Morris Plan Bank. It is not an unconditional promise to pay.

The Referee: All right, but supposing we go along that far with you, the note nevertheless is assignable, is it not?

Mr. Howard: Mr. White's interest in the note?

The Referee: Yes. Mr. White could have disposed of it?

Mr. Howard: Mr. White's right to receive the \$30,000.00, if he was obliged to pay the 30, was assignable.

The Referee: No, in any event, whether he paid the \$30,000.00 or did not pay the \$30,000.00, isn't this instrument which was received in evidence as Plaintiff's Exhibit [79] 29 an assignable instrument by White?

Mr. Howard: No, if the Court please, Mr. White had no rights under that instrument. That instrument was received by him, by Mr. White, as evidence of Herd's obligation to reimburse White in event White had to pay.

The Referee: No, it doesn't say so on its face.

Mr. Howard: Well, we have the testimony——

The Referee: No, I'm talking now about Mr. White's power to assign this instrument to a third party.

Mr. Howard: Well, the instrument means what the parties intended it to mean, and I contend that the evidence shows that this note was not to be sold or negotiated by Mr. White. It was simply evidence, in case something happened to Herd, that White would have some basis for making a claim for reimbursement, for reimbursement only for what he had expended, if anything, because of his accommodations to Herd.

Similarly, in the case of Brown vs. Volz, the parties to the note and joint tenancy interest could not have executed a deed conveying that interest. That would have been contrary to the understanding of the parties.

The Referee: But the deed would have been good, would it not?

Mr. Howard: The deed would have been good to

an innocent purchaser because nothing appeared on the record.

The Referee: And what about an assignment of this note?

Mr. Howard: There could be no innocent party because [80] of the notice on the face of the note, if the Court please. Mr. White had no power to sell this note without taking advantage, let us say, of some person. But the note itself was not negotiable because it is not an unconditional promise to pay the sum stated thereon and it would have been contrary to his understanding with Herd.

The Referee: All right, but if Herd had sued White on the Gibbons note could White have defended upon the note from Herd to White if White had assigned the note to somebody else?

Mr. Howard: You mean if White had breached his agreement and assigned the note to somebody else?

The Referee: Yes.

Mr. Howard: He would have no defense, having breached his agreement on the note; but the fact is that if Herd had sued White, equitably, having breached the agreement, the proceeds of that note would belong to Herd upon Herd's discharge of White's obligation to the Morris Plan Bank and Gibbons. In other words, the proceeds of that note would belong to Herd; if White contrary to his agreement sold it, they would belong to Herd.

The Referee: Well, let's shorten the argument a little bit.

Mr. Howard: All right.

The Referee: And let's assume for the purpose of the discussion that White was simply an accommodation maker on [81] the Gibbons note. What is the situation now that the Gibbons note is owned by the Trustee in Bankruptcy, who acquired it for a valuable consideration from Gibbons and who did not merely recover it from Gibbons but gave value therefor, to wit, the satisfaction of the claim of the Trustee in Bankruptcy against Gibbons on the ground of usury?

Mr. Howard: All right, in that connection let me say this: The law is—and this has nothing to do with Section 68 of the Bankruptcy Act because if we assume that White is an accommodation maker, as was the fact, then White is not urging an offset. White is then urging a defense to this note, and the question is can this defense be asserted against the Trustee.

The Referee: That is it.

Mr. Howard: Which is not determined by Section 68 having to do with offsets, which admit the liability sued on but which say there is another counter-liability.

In the question we are now discussing, there is no admission of liability and no offset tendered.

The law is plain that if Herd had the note and had purchased it from Gibbons, or had received it back from Gibbons in any way, and if the Trustee then came into possession of it, the Trustee couldn't sue an accommodation maker; and I cite in that—

The Referee: Well, now, wait. Let me see if I understand you. Are you saying now that if Herd

before bankruptcy [82] had the note, then his Trustee in Bankruptcy could not sue?

Mr. Howard: Yes.

The Referee: All right, let's go along with that; but that was not the fact.

Mr. Howard: No.

The Referee: Let's get down to the case we have here now.

Mr. Howard: All right. Now, instead of Herd having the note, the bankruptcy Trustee used Herd's assets to acquire the note. Now, does this make a different situation? If the Court please, Herd was obliged to pay this note to the accommodation maker. The agreement was, "I will give the note to Gibbons but when the funds are released from the attachment you will take up the note. I am lending you my credit. This is an accommodation. This is an accommodation note."

White was obliged to pay. The Trustee used Herd's assets to re-acquire that note. Does he become a purchaser of it? No. He extinguishes the obligation of the bankrupt because Herd's assets received by the Trustee were subject to Herd's obligations, one of those being to pay this note.

Now, if the Court please, I think an analogy will serve to illustrate the case. Let's suppose that White accommodated Herd by giving the note to Gibbons and Herd didn't go broke but he had funds, and Herd went to Gibbons and said, "Mr. Gibbons, I now have the \$5,000.00 that I owe you on [83] this obligation, I want to buy back Mr. White's note"; and Gibbons says, "Fine, give me the \$5,-

000.00, here is the note back.''' Would anybody in the world say that Herd then acquired the right to sue White on the note? No.

Now, is the situation different when the Trustee in Bankruptcy does that same thing? No, the situation is not different because Herd's assets were encumbered by the obligation to pick up this note. It is not as though the Trustee took assets which were not subject to this liability and paid them out when Herd didn't have to, thereby depleting the estate which was there for creditors. The assets which the Trustee had were subject to White's liability to pay this \$5,000.00 to Gibbons. The assets included this claim against Gibbons and were at all times, assuming this is an accommodation note, subject to the liability of Herd to pay that note.

The Referee: Well, now, let's elaborate on that. Do you say that Gibbons could sue Herd on the note?

Mr. Howard: Yes.

The Referee: Why?

Mr. Howard: Gibbons could sue Herd?

The Referee: Yes.

Mr. Howard: On the original note?

The Referee: On the White note.

Mr. Howard: On the \$5,000.00 note?

The Referee: Yes. [84]

Mr. Howard: Gibbons could have sued Herd or White. He had them both as obligors on that note.

The Referee: How do you figure that?

Mr. Howard: He could have sued White.

The Referee: Could he have sued Herd?

Mr. Howard: No.

The Referee: Then why do you say at the time of bankruptcy there was an indebtedness by Herd to Gibbons on the note?

Mr. Howard: Because Mr. White had the right to have that note paid by Herd at all times, at bankruptcy, before bankruptcy. The day that note was signed by White, Herd was the person who was liable to pay it as between White and Herd, and as far as the creditors are concerned, what difference did it make whether it was White who could have sued Herd or Gibbons who could have sued Herd? As far as the creditors are concerned, his assets were subject to this \$5,000.00 liability. When White signed the note to Gibbons that did not relieve Herd of a \$5,000.00 obligation. It simply was a transfer, as far as Gibbons was concerned, so that Herd instead of owing Gibbons owed White. White was willing to lend his credit to Herd. Gibbons was not. So Herd said, "All right, I will transfer that obligation to you. I will pay Gibbons. If I don't I will repay you."

So Herd owed \$5,000.00 at all times, and this transaction did not lessen Herd's indebtedness at all. It simply meant [85] that White became a surety to Gibbons for Herd's obligation. That is the nature of accommodation paper. I think it is perfectly plain if we had a balance sheet of Herd's liabilities before and after this transaction they would remain the same in both events. He got an extension of time, but the liability, the amount he

owed, was exactly the same: Let's assume he had no other obligations beyond these two of some \$30,000. He still owed the same amount.

And there is another angle of attack on this. That is the nature of the Trustee's action against Gibbons. This was an assertion of rights which were Herd's rights. Herd had them at that time, subject to all of his liabilities. The Trustee sued to compel Gibbons to disgorge assets of Herd which he acquired unlawfully. Forgetting for the moment the preference, the nature of this action was, "Gibbons, you have collected from Herd usurious rates of interest. You have received monies to which you are not entitled," including the very note in question. The Trustee compelled Gibbons to disgorge the fruits of his usury and they were given back to the Trustee. It was not a purchase and sale. It was not like the sale of automobiles because these were assets which Herd had all the time. The Trustee simply garnered in assets which Gibbons had gotten from Herd through usury, and he compelled Gibbons to disgorge and give them back. He took unto himself that which he had a right to as Trustee, these assets from Gibbons. [86]

Suppose, if the Court please, Herd had brought that action and had gotten this note back. Can it be said that he would have the right to sue Mr. White? No. When he got the note back it was in extinguishment of the note, not a purchase. And the same is true of the Trustee. The Trustee got back all of Gibbons' right, title and interest. Gibbons did not say, "This is a valid note, you will collect \$5,000

on it." He quitclaimed it. He said, "I have no right to it." He sold all of his right, title and interest. He said, "In your suit you claim that I had no right to get these payments. All right, I will give them back to you."

I submit that is not a purchase. You can think of the lawsuit as a medium in which there is a sale, but I say that is an improper conception of that lawsuit. It was a right to receive back things to which Gibbons had no title, and Gibbons said, "I'm not giving you this for \$5,000.00, I'm not negotiating it to you, I am recognizing I had no right to it and all of my right, title and interest I release to you.

Under those circumstances the Trustee did not buy this note at all. The Trustee received back a note which Herd had a right to receive back. Herd's assets at all times were subject to this obligation to White, and they remained so in the hands of the Trustee; and it is submitted, if the Court please, that this Trustee got this note in law the same as though Herd had filed the suit and had it in his possession [87] at the time of bankruptcy. The Trustee simply did what Herd had a right to do. The situation is the same as though Herd had filed and settled the lawsuit, and nobody in the world would say that Herd, the accommodated party, by so doing had the right to sue White any more than Herd would have the right to go to Gibbons, pay the \$5,000.00 note to Gibbons, and then turn around and sue White. He had no right to do that. He had the right, as Mr. White understood, to the extinguishment of the security to that extent. When Herd

paid the \$5,000.00 he had a right to have the \$30,000.00 note reduced by \$5,000.00.

That is not a negotiable instrument. It was intended that White would hold that as evidence of Herd's obligation; and I submit, if the Court please, that the \$30,000.00 note was not consideration for the instrument, was not consideration for the instrument. The law provides that an accommodation maker or party is one who receives no consideration for the instrument. He may receive consideration for lending his credit but he may not receive it for the instrument. White received no consideration for the instrument. He received nothing. He received a piece of paper which was evidence of his agreement with Herd, a non-negotiable piece of paper which when Herd paid the debt he was to reduce by \$5,000.00, and the Trustee is in no better position than Herd by reason of the fact that Herd at all times was subject to this liability, and his assets were subject to this liability [88] at the time of bankruptcy, and the bankruptcy Trustee simply exercised Herd's rights in the matter, not some later acquired rights.

Now, to address myself to the other point. Now we come to the question of offset. In this question it makes no difference whether White was an accommodation maker or otherwise. We will assume that White is obligated on the \$5,000.00 note to the Trustee, and in connection with offset the liability is admitted but it is claimed there is another different claim which is tendered as an offset. The tendered offset in this case is a \$30,000.00 note.

Under the Bankruptcy Law, Section 68, the right of offset is preserved to creditors of the bankrupt and to the bankrupt against claims. The requirements are that the claim which is tendered as the offset must be a claim that is provable in bankruptcy. I don't think there is any doubt as to the provability of the \$30,000.00 note in this case to the extent that Mr. White has paid on the obligations that he acted as accommodation for Mr. Herdon. The only question, and a serious question in this case, is are the debts mutual? That is, it is the Trustee suing White on an obligation which is owed in the same right and in the same capacity as the obligation which White is tendering as an offset.

Now, in some cases it has been said that the date of bankruptcy is a cutting-off point and that a subsequently [89] acquired obligation is therefore not mutual with an obligation that existed before the bankruptcy.

If the Court please, it is submitted that these statements are made in cases where that is true, but that it cannot be reasoned that that is true in every case. I would like to point to some authority on that to the Court.

The Referee: You mean new ones?

Mr. Howard: It is nothing in addition to what we have already furnished in our brief.

The Referee: Oh, well, I have read all that.

Mr. Howard: All right.

In this case, if the Court please, Herd goes—or rather Gibbons—let me put it this way: If the Court please, we are admitting and assuming White is

obligated to the Trustee on the \$5,000.00 note. The question then is is the \$30,000.00 obligation a mutual obligation—in other words, one which properly counteracts the other. I call the attention of the Court to the fact that these two obligations arise out of the very same transaction, and the doctrine of set-off is an equitable doctrine, the purpose being that a person is not required in bankruptcy to extend more credit to the bankrupt than he would have under normal conditions. It is an equitable doctrine to do the fair thing, and the Courts recognize that in some cases this means that a creditor who has an offset will receive more proportionately on his claim than a creditor who doesn't have an offset, but [90] that is fair because this creditor dealt with the bankrupt on such terms that the offset existed before bankruptcy, your Honor.

Then comes the question, was White in a situation before the bankruptcy whereby if there had been a suit on the \$5,000.00 note by Herd he could have tendered the \$30,000.00 note. Now, we can't confuse that with accommodation because if there is accommodation then the question doesn't arise. It is a defense. I am assuming now White doesn't have the defense of accommodation in a suit by Herd, that he received some independent compensation. But let's assume that Herd before the bankruptcy had acquired this note in any fashion, in any fashion, from Gibbons or from a subsequent assignee of Gibbons. Could Herd have sued White? Yes. Could White have offered the offset? Yes. There is nothing more fundamental in law, and I am quoting

from cases which the Court will agree with, I am sure, than that the accommodated party cannot sue the accommodating party. He cannot be a holder for value.

There is a \$30,000.00 obligation of Herd to White. If Herd acquires the \$5,000.00 obligation White could urge the offset. He could have urged it before bankruptcy. White was unwilling to go beyond that point before bankruptcy and the Trustee cannot convert that situation into a different situation by claiming the debts are not mutual; and in this connection I have assumed that the Trustee acquired it after [91] bankruptcy. As I said in the argument before, this is not the fact. The Trustee simply garnered in assets which Herd had. The Trustee was asserting no new rights in connection with the Herd suit. He was asserting Herd's rights and Herd's rights were subject to this \$30,000.00 note.

Now, the Trustee said in settlement, "Yes, these are the rights which I am willing to take, these are the very rights I am suing for." He got less than that, but these were still the rights that Herd had at the very time of bankruptcy, and Herd's right to bring that lawsuit was at all times subject to White's rights against Herd. This was not an after-acquired asset.

The Referee: All right, what do you gentlemen say? I'm not very much impressed with the straight out and out defense of offset. So let's not have any argument on that. Let's go back to the accommodation feature of it. What have you to say on that?

Mr. Wellins: On the accommodation feature?

The Referee: Yes, the argument that Mr. Howard made.

Mr. Wellins: I believe that he made the first part of his argument while I was at the library getting a few additional books, and therefore I did not have an opportunity of hearing all of it. I therefore would prefer that Mr. Weber reply to that.

The Referee: All right.

Mr. Weber: The question of accommodation maker presents [92] one problem because of the state of the record involving the admission of certain evidence which the Court excluded. Consequently, in making this argument I am perforce limited to that portion of the record which has been admitted in evidence.

The Referee: Well, I think for the sake of the argument on the legal question we may just as well assume that it was an accommodation instrument. Perhaps I confused you gentlemen by saying that Mr. White could have negotiated the note and he could have assigned it, but the fact is he still does have the \$30,000.00 note and there isn't any question in my mind at all but what Mr. White did not receive anything of value for the note that he signed in favor of Mr. Gibbons, and I am sure that it was not the intention, as I already said, that Herd would discharge his corresponding obligation to Mr. White by giving him this instrument. It was simply an evidence of the transaction and of the liability on the part of Herd.

So for the sake of the legal question involved,

let's assume that it was a straight out and out accommodation instrument.

Mr. Weber: Well, let's assume it was a straight out and out exchange of promissory notes. Would that be in accord with the present state of the record?

Mr. Horowitz: No.

The Referee: Well, let's see what he has to say about [93] it.

Mr. Weber: In that connection I would call the Court's attention to the case of Mellor vs. Rideout, 83 Cal. App. 621, at page 626.

The Referee: Yes. What does that say?

Mr. Weber: "The correspondence," and I am quoting, "in date, amount and interest warrants the inference that the instruments were cross-notes," citing the case of Mutual Loan Association vs. Brandt. "The rule is well established that a promissory note given by the maker, in exchange for a note given by the payee, is for a valuable consideration and not an accommodation, although made for the mutual accommodation of the parties."

That same case is referred to in a note in A. L. R. and in Corpus Juris, and in support of that same principle of law we would like to cite to your Honor 11 Corpus Juris Secundum, C. J. S., 397, and the cases which are therein cited, specifically Notes 19 and 20, some of which I have read and briefed here, and I would like to refer to them very briefly, and for the most part they uniformly announce the rule which I have adverted to and as is exemplified by the case of Mellor vs. Rideout. Where

promissory notes are exchanged each is a valid consideration for the other and the transaction cannot be considered as being an accommodation note.

Now, let's assume for the sake of the argument that [94] there was an intention of some kind on the part of White to accommodate Herd. Herd owed no obligation in law to White until White in some way had to respond legally in the way of liability upon that accommodation note. In other words, White had no recourse against Herd until he was obliged to respond in the way of payment or in an action to the payee or holder of the note. Notwithstanding that phase of it, Herd gave White his own promissory note in the sum of \$30,000.00 payable on a day certain in December of 1947, for a specific amount of money, notwithstanding the fact that at the time of the delivery of that note White had not yet been called upon to pay this alleged accommodation note; and treating it as a pure exchange of notes, the Mellor case and the many cases cited in the Corpus Juris notes which I have referred to establish the rule that the exchange of promissory notes in that fashion does not spell out an accommodation transaction, and that is so, your Honor, though one or both of the notes should turn out to be worthless. In other words, one will not be heard to say, "But the note you gave me in exchange turned out to be worthless."

Another case expounding that rule which is cited in Corpus Juris Secundum and which I have seen

cited frequently in many of the cases is *Farber vs. The National Forge & Iron Company*, 140 Indiana 54, in which the language used is as follows:

“Nothing is better established than that a promissory [95] given by the maker in exchange for a promissory note given by the payee is for a good consideration and is in no sense an accommodation note although made for the mutual accommodation of the parties.”

And it goes on to add:

“This is true although the note given in exchange is worthless.”

Another case of similar purport—and by the way, I have limited myself to the courts of last resort in all of these States. I have taken no intermediate courts of appeal.

Another case is *Merrill Trust Company vs. Brown*, 122 Maine 101, at page 105, and the Court reasons and holds as follows:

“The law is well settled that cross-notes, bills or checks though made for the accommodation of the parties are not accommodation but business paper, provided there is no restriction on use or negotiation, the one note, bill or check being a good consideration for the other received in exchange. Moreover, the transaction being complete at the time of the exchange, the question of original consideration is not affected by subsequent events, such as the failure of one of the parties to pay his note when due.”

The Referee: Well, let me stop you there. I don't think I can make that finding. I don't think

this was an exchange of promissory notes. In the first instance Mr. White [96] accommodated Mr. Herd by giving a \$5,000.00 note to Mr. Gibbons and a \$25,000.00 note to the Morris Plan Bank, and then as an evidence of the transaction a note was given by Mr. Herd to Mr. White. I couldn't call this an exchange of promissory notes. It was an accommodation transaction.

Mr. Weber: Well, such a finding in view of the state of the record with respect to the contemporaneous nature of the three transactions, namely, the note of the Morris Plan Bank of \$25,000.00 and Gibbons of \$5,000.00, and the contemporaneous note of \$30,000.00 of the bankrupt to White, could hardly support the contrary finding that they were cross-notes, because according to the testimony of Mr. White they were all related to each other, and the amount of \$30,000.00, if I recall the testimony of Mr. White correctly, was that the amount of \$30,000.00 was computed and arrived at by taking the \$25,000.00 and the \$5,000.00.

The Referee: Yes. There isn't any question but what Mr. White would have to produce the \$30,000.00 note before he could claim that Herd could not enforce the \$5,000.00 note, but nevertheless I think it was not intended to be an exchange of promissory notes in the sense that those cases treat with that kind of a situation. I think it was essentially, and I shall so find——

Mr. Weber: On the question of findings, or that particular finding, I direct the Court's attention specifically to the language in the California case

which I have already [97] cited, *Mellor vs. Rideout*, page 626:

“The correspondence in date, amount and interest warrants the inference that the instruments were cross-notes.”

The Referee: I know, but you don't find findings of fact in law books. You have to make findings of fact from the evidence before you, and that is what I find from this evidence here, that this was not intended as an exchange of promissory notes.

Mr. Weber: Well, that brings us to the next phase of that same question, and as I say, the state of the record presents something in the way of difficulty in the matter of argument. The matters which are embodied in the offers of proof, if they were considered as part of the evidence, we would then have open the avenue of argument to show what additional consideration inured to Mr. White in connection with these transactions. For example, if it be true——

The Referee: Well, I will stop you right there because further argument isn't going to help us on that proposition. All your offers of proof tended to show that Mr. White anticipated some kind of a business relationship with Mr. Herd, anticipated that he would acquire some kind of an interest in a business with Mr. Herd, from Mr. Herd or otherwise, but I listened very carefully to all of your offers of proof and there wasn't a single offer of proof that Mr. White received anything except maybe that your offers of proof indicated that he received a partnership interest, but that has [98]

already been adjudicated, that he did not.

Mr. Weber: I would like to——

The Referee: No, I haven't time, Mr. Weber.

Mr. Weber: I would like to state what the Court held to the contrary.

The Referee: I'm sorry.

Mr. Weber: Does the Court decide that argument be shut off at this point?

The Referee: Mr. Weber, please don't become irritated with the Court. The Court has the final responsibility here. The Court has its mind made up on that point and the Court will not have any further argument on that point.

Mr. Weber: May we go on to the next point?

The Referee: Yes, you may go on to the next point.

Mr. Wellins: Your Honor, I would like to address myself to this Section 68.

The Referee: No, there is no need to go into that. I wouldn't go along with counsel on his argument on a setoff. The thing that bothers me here is the accommodation feature of this transaction, Mr. Howard's argument that the Trustee was simply discharging a debt that Mr. Herd had anyway, and it is his further argument that the Trustee simply got back something that Mr. Gibbons was not entitled to keep, namely, these usurious payments which had been made. Mr. Howard's argument by inference is that the \$5,000.00 note represented usurious payments which Mr. Gibbons was not privileged [99] to keep. What about that?

Mr. Wellins: Let me reply to that in particular.

The Referee: Yes.

Mr. Wellins: The law says if a man receives usurious interest, that that is a wrongful act and that he is liable in damages to the party who has thus been wronged; and the law will go a step farther than that. It is not merely an inadvertent act of breach of contract. It is a tort case, and that the party committing the tort by way of collecting usurious interest is deemed as a matter of law to hold that subject to a trust in favor of the party who has thus been wronged.

Now, on August 6, 1947, when Mr. Herd had his petition in bankruptcy filed, involuntary petition, what was the status in regard to the matter that your Honor has just posed? The usurious interest had been charged. A cause of action existed in Herd for the recovery of the usurious interest. Mr. Gibbons as the one who had charged that interest was deemed as a matter of law to hold it subject to a trust and to be obliged to return it to Mr. Herd.

When the Trustee was appointed he succeeded to the rights of Mr. Herd to get that usurious interest back from Mr. Gibbons. That is the source of the Trustee's title here. That is the right through which he derives his cause of action against Mr. Gibbons as expressed in the Federal Court suit.

Now, on the date of the filing of the involuntary petition, [100] what was the status in regard to the \$5,000.00 note, what were the mutual rights and duties of the parties? A note had been given, Mr. Gibbons still held it, it had not been paid, and subsequently—well, leave out “subsequently.” It had not been paid.

As to the \$30,000.00 note, what was the situation? That, too, had been given by Herd to White and White held it. He still held it on the date of the filing of the petition and it, too, remained unpaid.

Now, considering all these matters together then, on the date of the filing of the petition the Trustee under Section 70 of the Bankruptcy Act succeeded to all of the rights of Mr. Herd, including the cause of action that Mr. Herd might have asserted against Mr. Gibbons for the usurious interest. The Trustee compromised that action and obtained possession of the funds on the \$5,000.00 note. I do not discuss at this moment, because I deem it immaterial to this part of the argument, the exact manner in which the money was obtained. Suffice it to say that the Trustee compromised the action in the Federal Court and ultimately obtained some \$6220.00, which was the total proceeds of the Gibbons note. That occurred after bankruptcy, after the filing of the petition.

If Mr. Howard is taking the position now that he waives the offset feature of this, then he must only be here on the accommodation defense. It could not be ascertained from [101] his pleadings and points and authorities heretofore filed that such was his position, for he referred there to offset and treated his points and authorities as a reply to the fact that an offset should be allowed according to his position. Now he says in effect, "I shall for the purpose of this argument waive the matter of offset and consider only the matter of defense." They

urge here as defense, by way of defense, that this was an accommodation note.

Now, the Court will not shut its mind to the fact that the \$30,000.00 note existed. It was never canceled. It was never surrendered. It was never paid, either. There has been no attempt by Mr. White to show how or why he can waive the \$30,000.00 note, and we submit that if he succeeds at all in this transaction it can only be by urging the \$30,000.00 note, and as a corollary of that, if he succeeds at all it can only be by urging the rights of offset under Section 68.

However, by referring to the date of the petition, we submit two things are immediately clear. No. 1, that on that date the Trustee did not have any rights in regard to this \$5,000.00 note. The Trustee had not yet been appointed, had not begun any negotiations, had not made any compromise. It was December, 1948, when the money was finally received in this matter, December 14, 1948, many, many months after the date of bankruptcy.

Now, furthermore, on the date of bankruptcy these obligations which we have discussed were not in the same [102] right, and it is a prerequisite of any claim asserted by Mr. White that he establish that the obligation on the \$30,000.00 note was in the same right as the Trustee's claim here. The Trustee's claim was the effect, or the result, rather, of a compromise with Gibbons of a claim arising principally out of usurious interest charges.

To clarify the matter, let's suppose that Mr. Gibbons had a lot of cash on hand and didn't have

to pay out the Trustee by way of giving him part cash and part assignment of proceeds or recovery in a lawsuit. Let's say that Mr. Gibbons had given the Trustee on the date of the compromise the sum of \$8,000.00 in cash. Could Mr. White now assert any claim to the \$8,000.00 or any part of it? Absolutely not. That claim arose out of the Trustee's compromise of a cause of action for usury and other related matters and it became part of the assets of the estate. If Mr. White wanted any money in this estate, his only recourse could have been at one time to file a claim and if the claim were allowed then he could get his share of the dividends if there were any funds out of which to pay him his pro rata dividend; but to that fund he had no way of asserting any claim, either by intervention or garnishment or anything of that sort. That became an asset of this estate.

Now, what the Trustee has done is substantially the same thing. The Trustee has succeeded to a portion of Mr. Gibbons' money in a direct cash payment and a portion of [103] Mr. Gibbons' money that Mr. Gibbons would have received if he had merely let the garnishment against him become effective.

So we have claims arising in different rights. Mr. White's claim against Herd is not necessarily the same as he can assert against the Trustee, and as a matter of fact he can still assert any claim he has against Herd, but the claim he had against Herd on the date of bankruptcy and the only claim he could have asserted on that date against the estate was a claim under the \$30,000.00 note, and even then

White could not have succeeded in having allowed to him a \$30,000.00 claim because as of that date he had not given \$30,000.00 consideration for it and there would have been a partial failure of consideration. That is why in Section 68 they refer wisely to a portion of 57G of the Bankruptcy Act by saying if you have a claim but it is not liquidated, as indeed the claim of White was not liquidated on that date—the \$30,000.00 was his potential maximum but in order to determine the amount it would have to be determined how much he had paid out and how much his security was worth by way of those reserves, to determine what the net was he had advanced to Mr. Herd; and according to the evidence which counsel has stipulated to here Mr. White has never had his \$30,000.00 note processed through this court to determine the net amount that may be owing by the estate of Al Herd, bankrupt, by reason of that \$30,000.00 note. [104]

So that on the date of bankruptcy we have an unliquidated note arising in a different right than the proceeds of the claim out of which the Trustee obtained his money. The Trustee having compromised a claim for usury obtained a total of \$8,000.00, all of which was obtained and all of which was done after bankruptcy, and none of which existed prior to the date of bankruptcy. On the date of bankruptcy there were no mutual claims or credits. Mr. White if he had anything had a direct personal debt to Al Herd—I mean from Al Herd, by reason of this \$30,000.00 obligation or by reason

of any balance of a net obligation owing on it after he paid what he owed.

The Court in this connection might be aided by the authority of *McDaniel National Bank vs. Bridwell*, 74 Federal (2nd) 331. The analysis of the principles about which we are speaking was clarified there. The Court, after quoting Section 68, states as follows:

“From the wording of this subsection”—that is Subsection 68A—“it is evident that before a creditor may enjoy the set-off principle against the bankrupt’s assets, two essential elements must be established: (1) two debts must exist, one of the creditor and one of the bankrupt’s estate; (2) these debts must be mutual, that is, the creditor’s debt must be owed to the estate of the bankrupt and the estate’s debt must be owed to this creditor. When these conditions are fulfilled the statute applies with [105] full force and may be taken advantage of. If such conditions are not fulfilled and the required mutual-ity is lacking, set-off is impossible under the statute.”

Well, of course, the final conclusion is a necessary result of the first two.

Now, were there two debts existing on the date of bankruptcy? Not in this case.

The Referee: Now, Mr. Wellins, I don’t think we need any argument on the question of set-off. The problem is whether or not the Trustee in Bankruptcy stands in the shoes of the bankrupt. The bankrupt could not have collected the note from Mr. White provided Mr. White had not assigned the \$30,000.00 note, and he had not. So that is

where we stand, and our problem is whether or not the Trustee is under the same limitations that Mr. Herd would have been under if he had acquired the note.

Mr. Wellins: Your Honor, I would like to speak on that point.

The Referee: Yes, let's get into that.

Mr. Wellins: We submit to the Court that the Trustee stands in the position given him under Section 70 of the Bankruptcy Act, and that he has as of the date of bankruptcy all the rights of a judgment creditor as well as all the rights of the bankrupt, and it is our position that the Trustee may, and is indeed under the law obliged to, take that position which most favorably inures to the benefit of [106] the bankruptcy estate even though the position of a judgment creditor whom he represents may be completely antagonistic to that of the rights of the bankrupt which he also represents for the purpose of his exercising title over the complete assets of the bankrupt.

On August 6, 1947, when this involuntary petition was filed, Mr. Quittner succeeded to the rights of Al Herd with respect to the recovery of usurious interest against Mr. Gibbons, and he purchased and compromised the claim—strike that. He compromised his claim against Mr. Gibbons by reason of his capacity as a representative of the creditors of Mr. Herd as well as his other capacity. He is entitled to rely upon his capacity as a representative of creditors in connection with his activities in gathering the assets of this estate from Mr. Gibbons and from other sources. So that it does not necessarily

follow that although Mr. White could have sued Mr. Herd he could also have sued the Trustee in Bankruptcy.

I think we have some authority that will be of help on that point.

Well, the case that I cited, McDaniel National Bank vs. Bridwell, is of aid on that point, your Honor, and in that case the Court said:

“Appellant was a creditor of Case and he was its debtor because of the note, and Hattie Winslow was a creditor of the bank, and it was her debtor because of the certificates [107] of deposit. It owed Case nothing. Case had parted with title to the money represented on the certificates. There was no mutuality of debts and credits between Case and the bank when the petition was filed, which is the time when the right of set-off must be measured. At that time by virtue of law there came to the Trustee in Bankruptcy the right to recover the certificates of deposit for the estate. This right was exercised and bore fruit.”

The Referee: All right, Mr. Wellins.

Mr. Wellins: And then going on in that same vein.

The Referee: Thank you. That will be all for your side for the moment.

Now, Mr. Horowitz and Mr. Howard, let me ask you a couple of questions here. You know that under Section 70 the Trustee is vested with title to property of the bankrupt, including under Subdivision 5 of Paragraph A of Section 70, “property, including rights of action, which prior to the filing

of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered.”

Now, if Mr. Herd prior to bankruptcy had transferred his cause of action against Gibbons for usury and the transferee in settlement of that cause of action had taken over the White note, or if a creditor had levied upon Herd's cause of action against Gibbons and had acquired it at judicial [108] sale, or had made a settlement with Gibbons and in that settlement had received the White note—in either of those situations could the note have been enforced against White? What do you say?

Mr. Horowitz: Well, I'm not sure, excepting I would like to make some suggestions that may clarify our position if the Court will permit me.

The Referee: All right.

Mr. Horowitz: And I think it will be of help.

The whole question of accommodation maker and bills and notes stems from the Law of Merchant which is probably as early as the English Common Law, and certain rules have developed with respect to that, and the theory behind accommodation maker is that if by any chance the note which was signed by the accommodation maker gets into the hands of the accommodated party, by whatever means, the accommodated party cannot recover because it would be unjust, it would be inequitable so to do. It just lends itself to our common sense and to the wisdom of the past.

Someone has said that the Common Law or the

law that has withstood is the congealed wisdom of the ages.

Now let's consider the actual facts that we have in this case. We have a situation that doesn't admit of doubt that Mr. White was an accommodation maker on that note. Then we have another situation which is admitted, that the Trustee in Bankruptcy had brought suit against Mr. Gibbons in [109] connection with claims of usury and with claims of a preference. At the same time that that was done, we had another lawsuit pending. That lawsuit was the one of Gibbons against White on that same \$5,000.00 note.

Now, there you have the situation; and in connection with that suit a defense had been raised. It is entirely possible in any litigation for a defendant to at a later time ask leave of court to file other and additional defenses, if any such additional defenses arise.

Now, let's consider the fact that this Bankruptcy Court had to consider and that the Trustee in Bankruptcy had to consider at the time he was negotiating with Gibbons for settlement of the suit of the Trustee in Bankruptcy against Gibbons. The claim was for a considerable sum of money, and the negotiations went on, and your Honor is familiar with the fact that the demand was for a greater amount than was finally settled for. That is the reason it was necessary to ask leave or to have a hearing to determine whether or not the claim for a greater sum should be settled for a lesser sum; and when the Trustee in Bankruptcy accepted the settlement,

what did he accept? First, he took \$3,000.00 in cash; and second, he took all of the right, title, and interest of Gibbons in that note.

The moment you couch an instrument in such language, "all to the right, title, and interest," you know that there is or may be certain defenses which will diminish the value [110] of that. The Trustee in Bankruptcy knew when he took that note that that note was an accommodation note, and when that accommodation note finally was transferred to the Trustee in Bankruptcy it was with knowledge that it was an accommodation note, and if it was an accommodation note, that is insofar as Mr. White was concerned, that he could set that up. They took that as a risk with their eyes wide open in a desire to settle that other lawsuit. There was no guarantee. They weren't taking that note for \$5,000.00 because they were buying or they were acquiring only all of the right, title, and interest. If it was to have been more than all of the right, title and interest, there would have been some guarantee of its producing a certain sum of money.

Now, it just makes good common sense, it makes an equitable situation, and this is a court of equity and this is an equitable proceeding to quiet title here—it makes good common sense that the Trustee in Bankruptcy under those circumstances not collect a note where the payor of that note was an ac-

commodation maker for the bankrupt in this estate. It isn't a case of being cute as far as procedure is concerned to figure out, "Well, we will do it this way and keep him out of a defense in the Superior Court rather than do it another way where the matter can be settled out in the open and the rights determined." That was taken with their eyes open, and they tried to figure out some way of circumventing the situation that existed. [111]

It just doesn't make common sense, in my opinion, to say that when you take an accommodation note under those circumstances, to say, "Well, for this purpose we will be like the Poobah or the Mikado, for some purposes we represent Herd and for other purposes we don't." They represent Herd. They stand in the shoes of Herd, and when they acquired that note with knowledge and while the lawsuit was pending and before a motion for summary judgment was made, and in the light of all the testimony that had been taken in the case, with knowledge of the facts, they took it knowing that Mr. White should have the right to claim that defense; and that is all that Mr. White is doing here. You can't say, I don't think anyone can say, that the Trustee in Bankruptcy's eyes were closed or shut off or his view was dimmed when that settlement was made, and it is simply a situation where the accommodation note finally found its way into the hands of the accommodated party, and once an accommodation note gets into the hands of the accommodated party, by whatever means it gets into his hands, in equity and in good conscience he should not collect on that note.

The Referee: Anything further?

Mr. Howard: Could I just briefly answer the question of the Referee in connection with the attachment creditor?

The Referee: Yes.

Mr. Howard: In the first place, the right to complain about usurious treatment is not an assignable right. Secondly, [112] any attaching creditor gets only what the debtor had, and the debtor here had no right to enforce the note against Mr. White; and thirdly, the Trustee took this not as an attaching creditor but in assertion of Mr. Herd's rights.

The Referee: Well, it would seem that if title vested in the Trustee to Herd's cause of action against Gibbons, that under this Subdivision 5 of Paragraph A it must either have been transferable by Herd or it must have been subject to levy by a creditor, because those are the two ways that a Trustee usually acquires title.

All right, gentlemen, is there anything further now?

Mr. Horowitz: Nothing further, your Honor.

The Referee: I don't think, gentlemen, that it was the intention of Mr. Gibbons merely to give up whatever he, Gibbons, might be able to recover on the White note. I don't think Gibbons had in mind that he was in any danger of not being able to get a judgment for the entire note. In the hands of Gibbons Mr. White had no defense. He owed the note. Gibbons had given a consideration for the note. He had credited the account of Herd with

\$5,000.00 in exchange for or in reliance upon the White note.

Now, I appreciate what Mr. Horowitz says, and Mr. Howard also, that usually when you make a conveyance of right, title and interest it is a suggestion that there is something wrong with it, that there is some defect in it, some flaw of some kind, either present or future, but I don't believe [113] that the use of that term in these papers which are here in this case relating to the Quittner-Gibbons settlement—I don't believe that was put in there with anything like that in mind. I am afraid it is just an incidental use of the phrase because as I point out Mr. Gibbons certainly could have collected that note from Mr. White, and the judgment proves that. The judgment of the Superior Court I think was even a summary judgment. There was a cause of action on the face of the pleadings. Mr. White had no defense unless he would have the defense which is urged here, but certainly the defense would not have been available against Gibbons.

So I am of the opinion that the Gibbons note in the hands of the Trustee in Bankruptcy, having been secured under the circumstances which have been brought out in the evidence here, is an entirely different sort of an instrument than it would have been in the hands of Mr. Herd. In the hands of Mr. Herd it could not have been enforced against Mr. White unless Mr. White should have been unable to produce the \$30,000.00 note which Mr. Herd gave to him. By that I mean to say if in the mean-

time Mr. White had assigned that instrument to someone else, then I think probably even Mr. Herd could have enforced the Gibbons note against Mr. White.

Judgment will be for the Trustee.

I assume you want findings, gentlemen?

Mr. Horowitz: Oh, yes, indeed.

The Referee: All, right, you gentlemen prepare findings. [114] Now, you have got quite a job here. You have got all these defenses to make findings on, but remember as to those the findings of fact are in favor of the other side.

The usual practice here is for the prevailing party to prepare findings and conclusions and order, deposit the original and one copy with the Referee, furnish counsel on the other side with a copy, or two copies if you would like to have it. We hold the original here for 5 days without acting on it so as to afford the aggrieved party an opportunity to make any suggestions that you want with respect to changes in the findings and conclusions and order. Or do you want more than 5 days?

Mr. Horowitz: Well, I think 5 days, unless there is some question. We are fortunate in having a transcript, so that there should be no question on the findings.

The Referee: Well, suppose we leave it this way: Mr. Wellins or Mr. Weber will advise you of the date upon which they are depositing the original with me. If you gentlemen want more than 5 days if you will give me a ring on the telephone that I am sure will be agreeable to the other side.

Mr. Weber: That is right.

The Referee: But let's fix it in the first instance at 5 days. [115]

Certificate

I, H. A. Singeltary, hereby certify that on the 31st day of January, 1950, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Benno M. Brink, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 16th day of May, 1950.

/s/ H. A. SINGELTARY,
Official Court Reporter.

[Endorsed]: Filed May 16, 1950.

[Endorsed]: Filed U.S.C.A. June 22, 1950. [116]

TRUSTEE'S EXHIBIT No. 2

In the District Court of the United States for the
Southern District of California Central Division

In Bankruptcy No. 45,176-BH

In the Matter of

AL HERD,

Bankrupt.

CERTIFICATE OF MAILING

I, Bessie Kyle, a regularly appointed and qualified clerk in the office of Benno M. Brink, Referee in Bankruptcy of the District Court of the United States for the Southern District of California at Los Angeles, hereby certify;

That on the 6th day of May, 1948, I personally, pursuant to instruction from said Referee in Bankruptcy and in the performance of my duties as such clerk, deposited in the U. S. Post Office in the City of Los Angeles, true copies of Notice of Hearing Trustee's Petitions to Compromise Controversies in the said matter, a copy of which is hereto attached; that said copies of said notice, so deposited, as aforesaid, were each enclosed in an envelope bearing the lawful frank of the said Referee in Bankruptcy and that said envelopes were respectfully addressed to each of the following: to each of the creditors in said matter at their respective addresses as they appear in the list of creditors of the said bankrupt-debtor or as afterwards filed with the papers in the case by the creditors; and to the

said bankrupt-debtor at his last known address as appears in said matter; to the said bankrupt-debtor's attorney, if any, at his address as filed by him with the Court; to the trustee in said matter and to his attorney, if any, at their respective addresses as filed by them with the Court; to the Commissioner of Internal Revenue, Washington, D.C.; Collector of Internal Revenue, Los Angeles, California; County Assessor, Los Angeles, California; County Tax Collector, Los Angeles, California; Department of Employment, Collection Unit, Unemployment Reserves Commission, State of California, Sacramento, California; Board of Equalization, State of California, Sacramento, California; and Franchise Tax Commissioner, State of California, Sacramento, California.

/s/ BESSIE KYLE,
Clerk.

In the District Court of the United States for the
Southern District of California Central Division
In Bankruptcy No. 45,176-BH

In the Matter of

AL HERD,

BANKRUPT.

NOTICE OF HEARING TRUSTEE'S PETI-
TIONS TO COMPROMISE CONTROVER-
SIES

To the Creditors of the Above Named Bankrupt:

On May 19, 1948, at 10 a.m., a meeting of creditors of the above named bankrupt will be held in the courtroom of the undersigned Referee, 323 Federal Building, Temple and Spring Streets, Los Angeles 12, California, for the following purposes:

1. To hear the petition to compromise Trustee's claim against A. McBride, dba McBride Auto Sales, as follows: That the objections to the claim filed in this bankruptcy proceeding by A. McBride, dba McBride Auto Sales in the sum of \$1900.00 be withdrawn upon surrender by the said A. McBride of the sum of \$400.00, which sum represents the amount of the payment made by the bankrupt herein to the said claimant prior to bankruptcy.

2. To hear the petition to compromise Trustee's claim against George L. Gibbons as follows: The said George L. Gibbons has offered to pay to the trustee herein the sum of \$3,000.00, payable as follows: the sum of \$1,500.00 on or before May 15,

1948, and the sum of \$1500.00 on or before June 15, 1948, in full settlement of that certain action filed by the trustee herein against the said George L. Gibbons on or about December 24, 1947, in this Court, bearing number 7870-Y, and in addition thereto the said George L. Gibbons agrees to transfer and assign to the trustee herein all his right, title and interest in and to that certain promissory note heretofore, executed by Joseph G. White to the said George L. Gibbons, dated on or about May 19, 1947, in the sum of \$5,000.00 plus interest and attorney's fees; or in the alternative, all the right, title and interest in and to any recovery by the said George L. Gibbons in the action pending in the Superior Court of the Los Angeles County against the said Joseph G. White. The settlement offer further provides for the withdrawal of the claim of George L. Gibbons in the sum of \$19,500.00 heretofore filed in this bankruptcy proceedings, without prejudice to any rights which the said Gibbons may assert against the bankrupt personally.

For further particulars you are referred to the said petitions on file in the office of the undersigned Referee in Bankruptcy.

BENNO M. BRINK,
Referee in Bankruptcy.

Dated: May 6, 1948.

Debtor .....	..
Debtor's Attorney .....	..
Bankrupt	1
Bankrupt's Attorney	1
Receiver	Dup.
Attorney for Receiver	Dup.
Trustee	1
Attorney for Trustee	1
Petitioner for Receiver	1
Creditors' Committee .....	..
Attorney for Creditors' Committee .....	..
Attorney for Petitioning Creditors'	Dup.
Assignee .....	..
Custodian .....	..
Schedule	56
Amendment to Schedule .....	..
List .....	..
Direct Claims	50
Power of Attorney	19
Request for Notices (Blue Sheet)	1
Taxing Agencies	3
Executory Contracts .....	..
U. S. Attorney .....	..
Secretary of Treasury .....	..
Securities and Exchange Commission .....	..
Person Reopening Case .....	..
Attorney for Person Reopening Case .....	..
Attorney filing dismissal, Compromise, etc.....	..
Total	134

Filed May 6, 1948. B. M. Brink, Referee.

[Endorsed]: Filed Oct. 4, 1949. (Exhibit No. 2.)

TRUSTEE'S EXHIBIT No. 5

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

ASSIGNMENT OF PROCEEDS

Know Ye that I, George L. Gibbons, plaintiff in the above action, do hereby transfer, assign and set over unto Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt, all my right, title and interest in and to any sums or proceeds recovered in said action, whether by way of judgment, settlement or otherwise, including principal, interest, attorney's fees, costs or otherwise; and I do further covenant and agree that said action be continued in my name as plaintiff. I hereby authorize and direct the defendants, and each of them, to pay such proceeds directly to said Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt.

I do hereby warrant that I have made no other assignments or transfers in connection with the promissory note which is the basis of said action, or the cause of action therein asserted, or any recovery which may be had therein.

In Witness Whereof, I have caused this instrument to be executed this instrument to be executed this . . . day of June, 1948.

/s/ GEORGE L. GIBBONS.

Witness:

/s/ WM. K. MELOY.

[Endorsed]: Filed Oct. 4, 1949. (Exhibit No. 5.)

TRUSTEE'S EXHIBIT No. 6

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 45,176-BH

In the Matter of

AL HERD,

Bankrupt.

PETITION AUTHORIZING TRUSTEE'S ATTORNEYS TO BE SUBSTITUTED IN
PENDING ACTION

The petition of Francis F. Quittner represents to this Court:

1. That he is the duly appointed, qualified and acting Trustee in Bankruptcy herein.

2. That petitioner has heretofore moved this Court for an order confirming a compromise of an action brought by the Trustee in Bankruptcy herein against one George L. Gibbons in the United States

District Court, Southern District of California, Central Division. By order of the Honorable Benno M. Brink, Referee in Bankruptcy herein, dated the 25th day of May, 1948, said compromise was confirmed and the Trustee authorized to settle said action and all claims against Gibbons for the sum of \$3,000.00, together with an assignment by Gibbons of all right, title and interest in and to any recovery which may be had in an action pending in the Superior Court, Los Angeles County, brought by said Gibbons against one Joseph G. White upon a promissory note dated May 19, 1947, in the principal sum of \$5,000.00.

3. That in view of the fact that this estate is entitled to the proceeds of any recovery in said action, petitioner believes it to be in the best interests of this estate that his attorneys, Marvin Wellins and Daniel A. Weber, be substituted as attorneys for the plaintiff, George L. Gibbons, in said pending action against Joseph G. White in the Superior Court, Los Angeles County, bearing No. 533306.

4. That petitioner is informed that his attorneys, as well as the firm of Jones & Wiener, the attorneys representing George L. Gibbons as plaintiff in said action, are willing to effectuate such substitution; and that the firm of Jones & Wiener is willing to waive any and all claims to any compensation for services rendered in said action, either out of any recovery or against this estate.

5. Petitioner is informed that said action is scheduled for trial on August 26, 1948.

6. Petitioner's attorneys herein are willing to accept for their services in said action in the Superior Court such sum as this Court may allow out of the above estate.

Wherefore, petitioner prays for an order authorizing his attorneys herein, Marvin Wellins and Daniel A. Weber, to be substituted in the place and stead of Jones & Wiener, Esqs., as attorneys for the plaintiff in the action now pending in the Superior Court, Los Angeles County, wherein George L. Gibbons is plaintiff, and Joseph G. White defendant, bearing case No. 533306.

Dated: June 16, 1948.

/s/ FRANCIS F. QUITTNER,
Trustee.

State of California,
County of Los Angeles—ss.

Francis F. Quittner being by me first duly sworn, deposes and says: that he is the Trustee in Bankruptcy in the above-entitled proceeding; that he has read the foregoing Petition Authorizing Trustee's Attorneys to be Substituted in Pending Action and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ FRANCIS F. QUITTNER.

Subscribed and sworn to before me this 16th day of June, 1948.

[Seal] /s/ ROSAMOND H. LEVY,
Notary Public in and for said County and State of
California.

[Endorsed]: Filed June 16, 1948. B. M. Brink,
Referee.

[Endorsed]: Filed Oct. 4, 1949. (Exhibit No. 6.)

TRUSTEE'S EXHIBIT No. 7

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 45,176-BH

In the Matter of
AL HERD,

Bankrupt.

ORDER AUTHORIZING TRUSTEE'S ATTOR-
NEYS TO BE SUBSTITUTED IN A PEND-
ING ACTION

Upon reading and filing the verified petition of
Francis F. Quittner, Trustee herein, and good cause
appearing therefor:

It Is Hereby Ordered that the Trustee's Attor-
neys herein, Marvin Wellins and Daniel A. Weber,
be, and they are hereby authorized to be substituted
in the place and stead of Jones & Wiener, Esqs., as
attorneys for the plaintiff in an action now pending

in the Superior Court of the State of California, County of Los Angeles, wherein George L. Gibbons is plaintiff, and Joseph G. White defendant, bearing case No. 533306.

Dated: June 16, 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed June 16, 1948. B. M. Brink,
Referee.

[Endorsed]: Filed October 4, 1949. (Exhibit
No. 7.)

TRUSTEE'S EXHIBIT No. 8

Receipt Is Hereby Acknowledged a check of American National Bank and Trust Company of Chicago, dated December 10, 1948, in the sum of Five Thousand Dollars (\$5,000.00), being check No. 820,132, payable to Joseph White and Marcella White, and endorsed by each of them; and

Receipt Is Further Acknowledged of check of the California Bank, Hollywood Office, No. 91800, dated December 14, 1948, in the sum of One Thousand Two Hundred Twenty Dollars (\$1,220.00), payable to the order of Marcella White, and endorsed by her.

These Checks have been delivered to me as one of the Attorneys for Francis Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt. A receipt is acknowledged on behalf of Francis Quittner, as said Trustee, and as payment in full of the claim of

George L. Gibbons against Joseph White, et al., Case No. 533306, Los Angeles County Superior Court, subject to any adjustment which may be appropriate for disbursements to Sheriff, as the same may be hereafter ascertained. The two checks mentioned above include, among other things, the sum of Fifty-five and 80/100 Dollars (\$55.80) on account of disbursements to Sheriff for execution sale in said Case No. 533306.

Dated: December 14, 1948.

MARVIN WELLINS and

DANIEL A. WEBER,

By /s/ MARVIN WELLINS,

Attorneys for George L. Gibbons, in Case No. 533306, and Attorneys for Francis F. Quittner, Trustee in Bankruptcy of Al Herd, Bankrupt.

[Endorsed]: Filed October 4, 1949. (Exhibit No. 8.)

TRUSTEE'S EXHIBIT No. 9

(Portion of)

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, DOE ONE, DOE TWO and
DOE THREE,

Defendants.

COMPLAINT

(Promissory Note)

The Plaintiff Complains of the Defendants and
for Cause of Action Alleges:

I.

That the true names and capacities, whether individual, corporate, associate or otherwise, of defendants Doe One, Doe Two and Doe Three, are unknown to plaintiff, who, therefore, sues said defendants by such fictitious names, and will ask leave of court to amend this complaint to insert the true names and capacities of such defendants when they shall have been ascertained.

II.

That on the 19th day of May, 1947, the defendant Joseph G. White made, executed and delivered

Trustee's Exhibit No. 9—(Continued)

to the plaintiff his promissory note, in words and figures as follows, to wit:

\$5000.00

May 19th, 1947

thirty..... after date without grace.....
..... promise to pay to the order of G. L. Gibbons
—Five Thousand—Dollars, For Value received, with
interest from date at the rate of 8% per cent per
annum until paid. Principal and interest payable
in Lawful Money of the United States at.....
..... and in case suit is instituted to col-
lect this note or any portion thereof
promise to pay such additional sum as the Court
may adjudge reasonable as Attorney's fees in said
suit.

/s/ JOS. G. WHITE.

No. #1—Due June 19th, 1947.

Witnessed

/s/ DONN B. DOWNEN, JR.

III.

That defendant has not paid the same or any part thereof, and that the sum of Five Thousand Dollars (\$5000.00), the amount due on said note, together with interest from the 19th day of May, 1947, is now due and owing from said defendant to plaintiff.

IV.

That by the terms of said note it is provided that in case suit is instituted to collect said note or any portion thereof, there shall be due to plaintiff such

Trustee's Exhibit No. 9—(Continued)

additional sum as the court may adjudge reasonable as attorney's fees in said suit; that it has been and is necessary for plaintiff to institute this action for collection of said note, and plaintiff has been compelled to, and has employed Jones and Wiener as his attorneys, to institute and prosecute this action; that the sum of One Thousand Dollars (\$1000.00) is a reasonable sum to be allowed plaintiff for the fees of his attorneys herein.

Wherefore, plaintiff prays judgment against defendant as follows:

- (1) For the sum of Five Thousand Dollars (\$5000.00), principal of said note;
- (2) Interest from the 19th day of May, 1947, at the rate of eight per cent (8%) per annum;
- (3) For the sum of One Thousand Dollars (\$1000.00) as reasonable attorneys' fees;
- (4) For costs of suit herein;
- (5) For such other and further relief as to the court seems proper.

JONES and WIENER,
Attorneys for Plaintiff.

By /s/ GEORGE M. WIENER.

State of California,
County of Los Angeles—ss.

George L. Gibbons, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled

Trustee's Exhibit No. 9—(Continued)

action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE L. GIBBONS.

Subscribed and sworn to before me this 11th day of August, 1947.

[Seal] /s/ GEORGE M. WIENER,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires Jan. 21, 1948.

[Endorsed]: Filed Aug. 12, 1947, Superior Court.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, DOE ONE, DOE TWO and
DOE THREE,

Defendants.

ANSWER OF DEFENDANT
JOSEPH G. WHITE

Comes now the defendant Joseph G. White and for answer to plaintiff's Complaint, admits, denies, and alleges as follows:

I.

This defendant is without sufficient information and belief to enable him to answer Paragraph I of plaintiff's Complaint, and basing his denial on that ground, denies generally and specifically each and every allegation, matter and thing therein contained.

II.

Denies generally and specifically each and every allegation, matter and thing contained in Paragraphs III and IV of plaintiff's Complaint, more particularly denying that this defendant is indebted to plaintiff in any sum whatsoever or at all.

Trustee's Exhibit No. 9—(Continued)

Wherefore, this answering defendant prays judgment.

As a Further Separate and First Affirmative Defense to Plaintiff's Complaint, This Defendant Alleges:

I.

That the note sued upon was executed without any consideration whatsoever.

Wherefore, this answering defendant prays judgment.

As a Further Separate and Second Affirmative Defense to Plaintiff's Complaint, This Defendant Alleges:

I.

That the debt for which the note was executed had been fully paid and discharged before the execution of the note herein.

Wherefore, this answering defendant prays that plaintiff take nothing by his Complaint, that this defendant be allowed to go hence with his costs, and for such other and further relief as to the Court seems meet and proper.

CANNON & CALLISTER,

By /s/ Illegible,

Attorneys for Defendant,

Joseph G. White.

Trustee's Exhibit No. 9—(Continued)

State of California,
County of Los Angeles—ss.

Joseph G. White, being by me first duly sworn deposes and says: That he is one of the defendants in the above-entitled matter; that he has read the foregoing Answer of Defendant Joseph G. White and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein stated on his information or belief, and that as to those matters and things he believes to be true.

/s/ JOSEPH G. WHITE.

Subscribed and sworn to before me this 22nd day of August, 1947.

[Seal] /s/ Illegible.

Notary Public in and for the County of Los Angeles,
State of California.

State of California,
County of Los Angeles—ss.

J. Spotts, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles: that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business address is 650 South Spring Street, Los Angeles 14, California. That on the 22nd day of August, A.D., 1947, affiant served the within Answer of Defendant Joseph G. White on the plaintiff's attorneys

Trustee's Exhibit No. 9—(Continued)

in said action, by placing a true copy thereof in an envelope addressed to Messrs. Jones and Wiener at the business address of said attorneys, as follows: 634 South Spring Street, Los Angeles 14, California and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ J. SPOTTS.

Subscribed and sworn to before me this 22nd day of August, 1947.

/s/ FLORENCE E. MORRISON,
Notary Public in and for
Said County and State.

[Endorsed]: Filed August 22, 1947. Superior Court.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

NOTICE OF MOTION AND AFFIDAVITS OF
GEORGE L. GIBBONS, DONN B. DOW-
NEN, JR., AND GEORGE M. WIENER IN
SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

To Defendant Joseph G. White and Cannon &
Callister, Esqs., His Attorneys:

Please Take Notice that on Monday, the 26th day of July, 1948, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the plaintiff will move this Court, in Department 35 thereof, the City Hall, Los Angeles, for an order under section 437c of the Code of Civil Procedure, striking the answer of defendant Joseph G. White and granting plaintiff summary judgment for the relief prayed for in the complaint.

Please Take Further Notice that said motion will be made on the grounds that the answer of said defendant is sham; that there is no triable issue of fact herein; and upon each and all of the grounds

Trustee's Exhibit No. 9—(Continued)

set forth in said section. Said motion will be based upon the annexed affidavit of George L. Gibbons, sworn to July 9, 1948; the annexed affidavit of Donn B. Downen, Jr., sworn to June 25, 1948; the annexed affidavit of George M. Wiener, sworn to June 24, 1948; and upon the pleadings and proceedings heretofore had herein.

Dated: July 13, 1948.

MARVIN WELLINS and

DANIEL A. WEBER,

By /s/ DANIEL A. WEBER,
Attorneys for Plaintiff.

Points and Authorities

I.

A denial or defense in form alone is not enough. The defendant must aver by affidavit "particulars" or "facts" of his defense as will satisfy the Court that he has an "arguable defense" on the merits.

C. C.P. 437c.

McComsey v. Leaf,

36 C.A.(2) 132, 140.

Eagle Oil & Ref. Co. v. Prentice,

19 C.(2) 553, 555.

Bank of America v. Oil Wells S. Co.,

12 C.A.(2) 265, 269.

Security-First Nat. Bank of Los Angeles v.
Cryer,

39 C.A.(2) 757, 760-761.

Trustee's Exhibit No. 9—(Continued)

II.

Summary judgment should be granted where "the issue is not genuine but feigned" or where the pleaded defenses are "sham."

McComsey v. Leaf,

36 C.A.(2) 132, 140.

Bank of America v. Oil Wells S. Co.,

12 C.A.(2) 265, 269.

In the Superior Court of the State of California

In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

AFFIDAVIT OF GEORGE L. GIBBONS IN
SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

State of Arizona,

County of Cochise—ss.

George L. Gibbons, being first duly sworn, deposes and says:

1. I am the plaintiff.

2. I make this affidavit in support of my motion pursuant to C.C.P. 437 (c) for an order striking the

Trustee's Exhibit No. 9—(Continued)

defendant's answer and granting summary judgment for the relief prayed for in the complaint.

3. The action is one to recover the sum of \$5,000.00, plus interest, and attorney's fees in the sum of \$1,000.00, upon a promissory note executed by the defendant Joseph G. White, payable to me, which note is in the following form:

\$5000.00

May 19, 1947

thirty..... after date without grace.....
..... promise to pay to the order of G. L. Gibbons—Five Thousand— Dollars, For Value received, with interest from date at the rate of 8% per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at
..... and in case suit is instituted to collect this note or any portion thereof,
promise to pay such additional sum as the Court may adjudge reasonable as Attorney's Fees in said suit.

/s/ JOS. G. WHITE.

No. #1—Due June 19th, 1947.

Witnessed

/s/ DONN B. DOWNEN, JR.

The answer filed by the said defendant admits the execution of said note and alleges, by way of defense lack of consideration for said note (first affirmative defense). The answer further alleges that the "debt for which the note was executed had been fully paid

Trustee's Exhibit No. 9—(Continued)
and discharged before the execution of the note herein" (second affirmative defense). No date or other circumstance of such alleged payment is alleged.

4. The circumstances surrounding the execution of said note are as follows: at or about the time of its execution (May 19, 1947) one Al Herd, a dealer in used cars, was indebted to me in the approximate amount of \$32,250.00 by reason of advances which I had theretofore made to Herd. These advances were secured in part by Herd's delivery to me of a number of "pink slips," or certificates of title, pertaining to certain motor vehicles purchased by Herd. Upon Herd's failing to repay said indebtedness, an action was brought by me against Al Herd on or about May 13, 1947, to recover said sum of \$32,250.00 plus interest. Said action was instituted in this court and bears case No. 529429.

5. At the time of the filing of the complaint in said action, a Writ of Attachment was issued and a levy thereupon made upon Herd's bank accounts. At or about the time said Writ of Attachment was levied as aforesaid the defendant interested himself in financing Herd's business and became associated with Herd in said automobile business.

6. Immediately after said attachment was levied a series of conferences were held, in which the following participated: the defendant Joseph G. White, Herd, Donn B. Downen, Jr. (the person whose name appears upon said note as witness

Trustee's Exhibit No. 9—(Continued)

thereto), Mr. George Wiener (my attorney) and myself. Mr. Downen was then acting as attorney for Messrs. Herd and White, the defendant. These conferences culminated in a meeting at the office of my attorneys, Jones & Wiener, 634 South Spring Street, Los Angeles, California, on or about the date of said note (May 19, 1947), at which I promised to release said attachment and dismiss the action brought by me against Herd and return certain certificates of title theretofore delivered to me by Herd covering certain motor vehicles purchased by him, in return for three promissory notes: one executed by the defendant, payable to me, in the sum of \$5,000.00 (the note in suit); one executed by Harry Karl in the sum of \$5,000.00; and the promissory note of Herd in the amount of \$20,500.00. The Karl note was thereafter paid, while the notes of the defendant White and Herd were thereafter defaulted.

7. Upon the execution and delivery of said notes, I released said attachment, dismissed said motion and redelivered to Herd the certificates of title in my possession which had theretofore been delivered to me by Herd. (An involuntary petition in bankruptcy was thereafter filed against Herd.)

8. The note in suit was thereafter presented for payment, and payment thereof was refused.

9. The claim interposed in the defendant's answer that there was no consideration for the note in suit is entirely fictitious. As has been pointed

Trustee's Exhibit No. 9—(Continued)

out, the consideration for said note was the release of my attachment on Herd's bank accounts, the dismissal of my action against him and my return to Herd of the certificates of title aforesaid, thus enabling Herd's business to continue. Furthermore, Herd's pre-existing indebtedness to me, previously referred to, was extinguished to the extent of said \$5,000.00, the amount of the defendant's note. Similarly, the Karl note further extinguished Herd's subsisting indebtedness to me in the additional amount of \$5,000.00, in consequences of which I accepted Herd's note in the lesser sum of \$20,500.00, the previous indebtedness of Herd being approximately \$32,250.00.

10. I claim that there is no defense to the action. The foregoing facts, which are within my direct knowledge, establish conclusively that the defenses interposed by the defendant are sham, fictitious and frivolous, and that there is no triable issue of fact.

11. I affirm further that by reason of the defendant's default in payment of principal and interest I was obliged to retain the services of Jones and Wiener to institute this action; and that my present attorneys, Marvin Wellins and Daniel A. Weber, were substituted in their stead on June 2, 1948.

Wherefore, I pray for an order under Section 437(c) of the Code of Civil Procedure striking out the defendant's answer and granting plaintiff sum-

Trustee's Exhibit No. 9—(Continued)

mary judgment in the sum of \$5,000.00, plus interest at the rate of 8% per annum from June 19, 1947, plus reasonable attorney's fees, together with costs of suit, as prayed in the complaint.

/s/ GEORGE L. GIBBON.

Subscribed and sworn to before me this 9th day of July, 1948.

[Seal] /s/ WM. K. MELOY,
Notary Public in and for the County of Cochise,
State of Arizona.

My Commission Expires July 23, 1950.

In the Superior Court of the State of California in
and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

AFFIDAVIT OF DONN B. DOWNEN, JR.

State of California,
County of Los Angeles—ss.

Donn B. Downen, Jr., being first duly sworn, deposes and says:

1. I am an attorney at law, with offices in the

Trustee's Exhibit No. 9—(Continued)

City of Los Angeles, State of California, and formerly represented Al Herd in connection with the automobile business heretofore conducted by Herd at 7077 Sunset Boulevard, Los Angeles.

2. I recall the execution of the note in suit and the circumstances surrounding the same. My recollection is as follows: One Al Herd was indebted to the plaintiff in a sum in excess of \$30,000.00 in May, 1947. During said month White became interested in Herd's business and undertook to put up certain finances. Several days prior to the execution of the note Gibbons' attorneys (Jones & Wiener) procured a Writ of Attachment in an action brought in this Court by Gibbons against Herd, and caused the same to be levied upon Herd's bank accounts. White and Herd thereupon came to me with a view to bringing about the release of said attachment and the dismissal of said action. After some meetings in my office, we met in the office of Jones & Wiener on or about May 19, 1947, the date of the execution of the note. After much negotiation Gibbons promised and agreed that he would release the attachment, dismiss the action and return to Herd certain certificates of title pertaining to automobiles purchased by Herd which had been delivered by Herd to Gibbons as security for repayment of advances, in return for three promissory notes as follows: a note executed by White in the sum of \$5,000.00 (the note in suit), a note executed by one Harry Karl in the sum of \$5,000.00, and a note

Trustee's Exhibit No. 9—(Continued)

executed by Herd in the sum of \$20,500.00. The said parties agreed that the two notes of \$5,000.00 each were to be accepted as payment pro tanto on Herd's indebtedness to Gibbons. Herd's note represented the approximate difference between the pre-existing indebtedness of Herd to Gibbons and the two notes of White and Karl aggregating \$10,000.00.

3. Said notes were thereupon delivered, and I witnessed the execution of the note in suit and affixed my name thereto as a witness. The Writ of Attachment procured by Gibbons in said action was thereupon released, the action dismissed, and said certificates of title were returned to Herd.

4. I make this affidavit at the request of the plaintiff's attorneys, and I affirm that I have no interest in the action or in any recovery.

/s/ DONN B. DOWNEN, JR.

Subscribed and sworn to before me this 25th day of June, 1948.

[Seal] /s/ EDNA R. BENNETT,
Notary Public in and for the County of Los Angeles, State of California.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California in
and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

AFFIDAVIT OF GEORGE M. WIENER IN
SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

George M. Wiener, being first duly sworn, deposes and says:

1. I am a member of the firm of Jones & Wiener, attorneys at law, of Los Angeles, California, which firm formerly represented the plaintiff in this action.

2. Messrs. Wellins and Weber have been substituted in our place and stead as attorneys for the plaintiff by stipulation of the parties.

3. I state of my own knowledge that on or about May 13, 1947, my firm instituted an action on behalf of the plaintiff against one Al Herd in this court to recover the sum of \$32,250.00, plus interest,

Trustee's Exhibit No. 9—(Continued)

representing an indebtedness owed by Herd to the plaintiff. Said action bears No. 529429. We procured a Writ of Attachment in said action and caused the same to be levied by the Sheriff of the County of Los Angeles upon Herd's bank accounts. Immediately thereafter negotiations were under way looking to the lifting of said attachment and the dismissal of the action. The following participated in said negotiations: Mr. Donn B. Downen, Jr., the defendant Joseph G. White, Herd, the plaintiff and myself. Mr. Downen was then acting as attorney for Messrs. White and Herd in connection with the automobile business conducted by Herd at 7077 Sunset Boulevard, Los Angeles, California, in which White had become interested financially. After several meetings an agreement was reached in my office, at which meeting said persons were present. By the terms of said agreement the plaintiff, my client, agreed to release said attachment, dismiss the action and return certain certificates of title in his possession pertaining to certain motor vehicles theretofore purchased by Herd, which certificates had been given to the plaintiff by Herd as security for the repayment of said advances. Herd and White agreed that the following three promissory notes would be delivered to the plaintiff: White's note for \$5,000.00 (the note in suit), a note executed by one Harry Karl in the sum of \$5,000.00, and the note of Herd in the sum of \$20,500.00. It was agreed that the two notes of White and Herd would be accepted in

Trustee's Exhibit No. 9—(Continued)
payment pro tanto of the pre-existing indebtedness of Herd to the plaintiff.

4. Said notes were thereupon executed and delivered to the plaintiff, the note in suit being witnessed by Mr. Downen, who was then acting as attorney for White and Herd in the transaction.

5. The attachment was thereupon lifted, a dismissal filed and the certificates of title in plaintiff's possession returned to Herd.

6. The Karl note was thereafter paid, while the note in suit and the Herd note were defaulted.

7. In connection with the prayer in the complaint for attorney's fees, pursuant to the provisions of the note, I state as follows: upon retention by the plaintiff I examined into the facts, which necessitated several conferences and examinations of many documents; prepared and filed the complaint in this action; procured the issuance of Writ of Attachment and caused the same to be levied upon the defendant's real property; noticed the case for trial; spent a total of ten hours on legal research, and spent approximately 30 hours in the preparation of the case for trial.

8. I state that neither my firm nor I have any interest in this action or in any recovery.

/s/ GEORGE M. WIENER.

Trustee's Exhibit No. 9—(Continued)

Subscribed and sworn to before me this 24th day of June, 1948.

[Seal] /s/ MARY JANE SANDERS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Apr. 12, 1950.

(Affidavit of Service by Mail—1013a, C.C.P.)

State of California,
County of Los Angeles—ss.

Shirley Nakell, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is: 208 South Beverly Drive, Beverly Hills, California; that on the 13th day of July, 1948, affiant served the within Notice of Motion and Affidavits of George L. Gibbons, Donn B. Downen, Jr., and George M. Wiener in Support of Plaintiff's Motion for Summary Judgment on the Defendant Joseph G. White in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Defendant Joseph G. White at the office of said attorneys, as follows: Cannon & Callister, Attorneys at Law, 650 So. Spring St., Los Angeles, Calif., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at the city

Trustee's Exhibit No. 9—(Continued)
where is located the office of the attorney for the
person by and for whom said service was made.

That there is a delivery service by United States
mail at the place so addressed or there is a regular
communication by mail between the place of mailing
and the place so addressed.

/s/ SHIRLEY NAKELL.

Subscribed and sworn to before me this 13th day
of July, 1948.

[Seal] /s/ DANIEL A. WEBER,
Notary Public in and for Said County and State of
California.

My Commission expires Oct. 29, 1951.

[Endorsed]: Filed July 15, 1948, Superior Court.

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

SUBSTITUTION OF ATTORNEYS

Plaintiff George L. Gibbons hereby substitutes
Marvin Wellins and Daniel A. Weber as his attor-

Trustee's Exhibit No. 9—(Continued)

neys of record in place and stead of Jones & Wiener, Esqs.

Dated: June 2, 1948.

/s/ GEORGE L. GIBBONS.

We consent to the above substitution.

JONES & WIENER,

By /s/ GEORGE M. WIENER.

Above substitution accepted.

MARVIN WELLINS, and

DANIEL A. WEBER,

By /s/ DANIEL A. WEBER.

(Affidavit of Service by Mail—1013a, C.C.P.)

State of California,

County of Los Angeles—ss.

Shirley Nakell, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is: 208 South Beverly Drive, Beverly Hills, Calif.; that on the 13th day of July, 1948, affiant served the within Substitution of Attorneys on the Defendant in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Defendant at the office address

Trustee's Exhibit No. 9—(Continued)
of said attorneys, as follows: Cannon & Callister,
Attorneys at Law, 650 So. Spring St., Los Angeles
14, Calif., and by then sealing said envelope and
depositing the same, with postage thereon fully pre-
paid, in the United States Mail at the city where is
located the office of the attorney for the person by
and for whom said service was made.

That there is a delivery service by United States
mail at the place so addressed or there is a regular
communication by mail between the place of mailing
and the place so addressed.

/s/ SHIRLEY NAKELL.

Subscribed and sworn to before me this 15th day
of July, 1948.

[Seal] /s/ DANIEL A. WEBER,
Notary Public in and for said County and State of
California.

My Commission expires Oct. 29, 1951.

[Endorsed]: Filed July 16, 1948. Superior Court.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE et al.,

Defendants.

JUDGMENT AFTER ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

The plaintiff having moved this court by notice of motion dated July 13, 1948, for summary judgment pursuant to section 437c of the Code of Civil Procedure, striking out the defendant's answer and granting the plaintiff judgment for the relief prayed for in the complaint; and said motion having duly come on to be heard in Department 35 of this Court on the 16th day of August, 1948; and the plaintiff having filed the affidavit of George L. Gibbons, sworn to the 9th day of June, 1948, the affidavit of Donn B. Downen, Jr., sworn to the 25th day of June, 1948, and the affidavit of George M. Wiener, sworn to the 24th day of June, 1948, in support of said motion; and the defendant Joseph G. White having filed his affidavit, sworn to the 4th day of August, 1948, in opposition to said motion; and Marvin Wellins and Daniel A. Weber, by Dan-

Trustee's Exhibit No. 9—(Continued)

iel A. Weber, attorneys for the plaintiff, having been heard in support of said motion; and Fred Horowitz and Alvin F. Howard, by Alvin F. Howard, attorneys for the defendant Joseph G. White, having been heard in opposition thereto; and said motion having been granted in all respects on August 16, 1948; and sufficient cause appearing therefor;

Now, on motion of Mervin Wellins and Daniel A. Weber, attorneys for plaintiff, it is

Ordered, Adjudged and Decreed that George L. Gibbons, plaintiff, have judgment against Joseph G. White, defendant, for the sum of \$5,000.00, with interest thereon from the 19th day of May, 1947, at the rate of eight (8%) per cent per annum, in the sum of \$500.00, plus the additional sum of \$500.00 representing reasonable attorney's fees herein, making a total of \$6,000.00; and it is further

Ordered and Adjudged that plaintiff recover his costs of suit in the sum of \$35.75; and it is further

Ordered that issuance of execution upon said judgment be stayed for twenty days after entry thereof.

Dated at Los Angeles, California, this 24th day of August, 1948.

/s/ VERNON W. HUNT,

Judge of the Superior Court.

[Stamped]: Wholly Unsatisfied by Sheriff 10-15-48 with Further Costs of \$17.30.

Trustee's Exhibit No. 9—(Continued)

Attest:

W. G. SHARP,
County Clerk.

By C. REICHERT,

10-27-48

Deputy.

Wholly Unsatisfied by Sheriff 12-23-48, with
Further Costs of \$19.25.

Attest:

W. G. SHARP,
County Clerk.

By FERN CHEWNING,

1-5-49

Deputy.

[Entered]: Aug. 25, 1948. Superior Court.

[Endorsed]: Filed August 24, 1948. Superior
Court.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 533,306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

NOTICE OF ENTRY OF JUDGMENT

To Defendant Joseph G. White and Fred Horowitz
and Alvin Howard, His Attorneys:

Please Take Notice that on August 25, 1948, judgment was entered in favor of plaintiff and against defendant Joseph G. White for the sum of \$5,000.00, plus interest in the sum of \$500.00, plus attorney's fees in the sum of \$500.00, making a total in the sum of \$6,000.00; and further adjudging that plaintiff recover his costs. Twenty days' stay of execution.

Dated: August 30, 1948.

MARVIN WELLINS, and

DANIEL A. WEBER,

By /s/ DANIEL A. WEBER,

Attorneys for Plaintiff.

Trustee's Exhibit No. 9—(Continued)

(Affidavit of Service by Mail—1013a, C.C.P.)

State of California,
County of Los Angeles—ss.

Daniel A. Weber, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is: 208 S. Beverly Dr., Beverly Hills; that on the 30th day of August, 1948, affiant served the within Notice of Entry of Judgment on the defendant Joseph G. White in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendant at the office address of said attorneys, as follows: Messrs. Fred Horowitz and Alvin F. Howard, 604 Union Bank Bldg., Los Angeles 14, Calif., and by then sealing said envelope and depositing the same, with proper postage thereon fully prepaid, in the United States Mail at the city where is located the office of the attorneys for the person by and for whom said service was made.

That there is a delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ DANIEL A. WEBER.

Trustee's Exhibit No. 9—(Continued)

Subscribed and sworn to before me this 30th day of August, 1948.

[Seal] /s/ [Illegible],
Notary Public in and for said County and State of
California.

[Endorsed]: Filed August 1, 1948. Superior
Court.

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE,

Defendant.

SATISFACTION OF JUDGMENT

The Judgment herein having been paid, full satisfaction is hereby acknowledged of said Judgment entered August 25, 1948, in Book 1954, Page 37, of Judgments, in favor of George L. Gibbons and against Joseph G. White, and the Clerk is hereby

Trustee's Exhibit No. 10—(Continued)
authorized and directed to enter full satisfaction
of record in said action.

Dated: December 13, 1948.

MARVIN WELLINS, and
DANIEL A. WEBER,
By /s/ DANIEL A. WEBER,
Attorneys for Judgment
Creditor.

State of California,
County of Los Angeles—ss.

On this 13th day of December, in the year one
thousand nine hundred and forty-eight, before me,
Shirley Nakelsky, a Notary Public in and for said
County of Los Angeles, State of California, resid-
ing therein, duly commissioned and sworn, person-
ally appeared Daniel A. Weber, known to me to be
the same person whose name is subscribed to the
within instrument, and he duly acknowledged to me
that he executed the same.

In Witness Whereof, I have hereunto set my
hand and affixed my Official Seal the day and year
in this certificate first above written.

[Seal] /s/ SHIRLEY NAKELSKY,
Notary Public in and for the County of Los An-
geles, State of California.

[Endorsed]: Filed December 17, 1948. Superior
Court.

[Endorsed]: Filed October 4, 1949. (Exhibit
No. 9.)

TRUSTEE'S EXHIBIT No. 10

(Portion of)

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 542157

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of AL HERD, Bankrupt,
Plaintiff,

vs.

JOSEPH G. WHITE, FILMLAND MOTORS, a California Corporation; AL HERD, INC., a California Corporation; JOHN DOE ONE, JOHN DOE TWO; JOHN DOE CORPORATION, a California Corporation; RICHARD ROE and SAMUEL DOE, Individually and as Co-partners, Doing Business as ROE & DOE, Defendants.

COMPLAINT

(Action for Partnership Accounting)

Plaintiff complains and alleges:

I.

That on or about August 6, 1947, an involuntary petition in bankruptcy was filed against one Al Herd (hereinafter called the "bankrupt") in the United States District Court, Southern District of California, Central Division; and that on or about August 13, 1947, the said Al Herd was duly adjudi-

Trustee's Exhibit No. 10—(Continued)

cated a bankrupt within the purview of the Federal Bankruptcy Acts.

II.

That plaintiff is the duly appointed, qualified and acting trustee in bankruptcy of said bankrupt.

III.

That plaintiff has been authorized by said bankruptcy court to institute this action.

IV.

That defendant Filmland Motors is a corporation duly organized and existing under the laws of the State of California; and that the name of said corporation was formerly Angel Motors.

V.

That defendant Al Herd, Inc., is a corporation duly organized and existing under the laws of the State of California.

VI.

That defendants John Doe One, John Doe Two, John Doe Corporation, a California corporation; Richard Roe and Samuel Doe, individually and as co-partners doing business as Roe and Doe (all of whom are hereinafter called the "Doe defendants"), are sued herein by fictitious names, their true names being unknown to plaintiff; and upon ascertainment thereof, plaintiff will ask leave of Court to amend the summons, complaint and all other papers and proceedings herein to include their true names.

Trustee's Exhibit No. 10—(Continued)

VII.

That on or about November 27, 1945, one A. F. Rosen and Gertrude Rosen, as sublessors (hereinafter called "sublessor"), and the bankrupt, as sublessee, entered into a written sublease bearing said date, whereby said sublessor leased unto said sublessee certain buildings and premises located at and commonly known as 7077 Sunset Boulevard, and 1512 North La Brea Avenue, in the City of Los Angeles, State of California, for a term commencing said date and expiring January 31, 1947, with an option therein contained in favor of said sublessee for an additional year thereafter, and a further option in favor of said sublessee for an additional two years following the expiration of said one-year period. Said written sublease is hereinafter called the "lease," and the aforesaid buildings and premises covered thereby, the "demised premises."

VIII.

That pursuant to the terms of said lease, the term thereof was heretofore extended for the additional year expiring January 31, 1948.

Plaintiff Is Informed and Believes, and Upon Such Information and Belief Further Alleges:

IX.

That in or about the month of May, 1947, and continuously from November 27, 1945, the bankrupt conducted upon the demised premises, and was en-

Trustee's Exhibit No. 10—(Continued)

gaged in, the business of (a) buying and selling at retail used cars and motor vehicles, and (b) operating auction sales of cars and motor vehicles upon the demised premises. (The auction sales referred to in "(b)" hereof are hereinafter called the "auction business"; both "(a)" and "(b)" hereof are collectively hereinafter called the "business.")

X.

That in and during the month of May, 1947, the bankrupt and defendant Joseph G. White, for a valuable consideration, entered into an oral agreement of partnership, whereby the parties agreed as follows:

(a) The bankrupt and defendant White were to operate as partners the auction business aforesaid, for a term commencing on the date of said agreement, and expiring January 31, 1948.

(b) The bankrupt was to permit the partnership to use and occupy the demised premises for said auction business, reserving unto himself the right to continue his business of buying and selling at retail used cars and motor vehicles upon the demised premises, and further to contribute the good-will of the said auction business theretofore conducted by the bankrupt upon the demised premises, as well as his experience and knowledge in operating the same, and his personal services in conducting said auction business for and on behalf of the partnership;

(c) Defendant White was to pay to creditors of

Trustee's Exhibit No. 10—(Continued)

the bankrupt, for and on account of debts theretofore incurred by the bankrupt, the sum of Thirty-five Thousand and no/100 Dollars (\$35,000.00); and

(d) The parties were to share profits and losses from said auction business in the proportions of seventy-five per cent (75%) to the bankrupt, and twenty-five per cent (25%) to defendant White.

XI.

That thereafter, and in or during the month of May, 1947, the bankrupt and defendant White orally modified and supplemented said agreement of partnership and agreed as follows:

(a) The bankrupt and defendant White were to operate as partners, for the term described in paragraph X(a) hereof, the business of buying and selling at retail used cars and motor vehicles upon the demised premises, in addition to their operation of the auction business as aforesaid;

(b) The reservation by the bankrupt of the right to conduct on his personal behalf the buying and selling at retail of used cars and motor vehicles, as alleged in paragraph X hereof, was annulled and extinguished;

(c) The bankrupt was to contribute further to the partnership: (1) the good-will of the entire business theretofore conducted by him upon the demised premises, (2) any and all accounts receivable belonging to said business, (3) any and all residual rights in and to dealer's reserves or credits in favor of or belonging to the bankrupt, and (4)

Trustee's Exhibit No. 10—(Continued)

his experience, knowledge and personal services in the operation of said business for and on behalf of the partnership;

(d) Defendant White was to contribute to the partnership the sum of Sixty-five Thousand and no/100 Dollars (\$65,000.00), in addition to the sum of Thirty-five Thousand and no/100 Dollars (\$35,000.00) referred to in the preceding paragraph hereof;

(e) The partnership was to assume and pay all the debts and liabilities of the bankrupt theretofore incurred by him in the operation of said business; and

(f) The parties were to share the profits and losses from the entire business in equal proportions.

(The partnership agreement as so amended and supplemented is hereinafter called the "partnership agreement.")

XII.

That thereafter, pursuant to said partnership agreement, the parties conducted business as partners in buying and selling at retail used cars and automobiles, and in operating auction sales of cars and motor vehicles, upon the demised premises.

XIII.

That in and during the month of July, 1947, defendant White, by the exercise of threats, duress and menace, forcibly excluded the bankrupt from further participation in the affairs and conduct of said business, denied him access to the premises,

Trustee's Exhibit No. 10—(Continued)
and thereupon took sole possession of the demised premises and the personal property of said business.

XIV.

That defendant White thereupon repudiated said partnership agreement, and his duties thereunder, and in violation thereof, and of his fiduciary obligations to the bankrupt, retained possession of said demised premises and undertook on his own behalf the conduct and operation of said business.

XV.

That defendant White thereupon caused a corporation to be organized under the laws of the State of California, to wit, Angel Motors, which was and is owned and controlled by defendant White; that its officers and directors were and are nominees and designees of defendant White; and that the name of said corporation was thereafter changed to Film-land Motors, defendant herein.

XVI.

That subsequent to his taking exclusive possession as aforesaid, defendant White did wrongfully induce said sublessor to declare said lease cancelled and terminated in writing, and to execute to his nominee, to wit, Angel Motors (Film-land Motors), as sublessee, a new written sublease of the demised premises for a term commencing August 1, 1947, and ending January 31, 1948. (Said sublease is hereinafter called the "White lease.")

Trustee's Exhibit No. 10—(Continued)

XVII.

That from its inception, defendant Angel Motors (Filmland Motors) had knowledge of the facts herein alleged.

XVIII.

That at divers times in and during the month of July, 1947, defendant White wrongfully took and converted to his own use certain funds, checks and instruments for the payment of money belonging to said partnership, representing the proceeds from auction sales conducted upon the demised premises on or about July 8, July 15, and July 22, 1947; and that other funds have been received by him belonging to the partnership, for all of which he has failed to account, and which he has also converted to his own use.

XIX.

That at all times from the taking of possession by defendant White as aforesaid, and until on or about February 1, 1948, said defendant, either directly or through defendant Filmland Motors as his instrumentality, continued in possession of the demised premises and continued to operate the business theretofore conducted by the said partnership.

XX.

That between the making of said Partnership Agreement and the filing of said Petition in Bankruptcy, the bankrupt personally paid to the partnership employees diverse sums as and for partnership payroll for wages and also paid, on behalf of said

Trustee's Exhibit No. 10—(Continued)

partnership, diverse sums to creditors whose claims had been assumed by said partnership as alleged in paragraph V hereof, all of which payments aggregated the sum of approximately Twenty-five Thousand Dollars (\$25,000.00), the exact amount being unknown to plaintiff. That said payments and each of them were made by the bankrupt on behalf of said partnership, and that the same are due, owing and unpaid by said partnership to the bankrupt.

XXI.

That neither the partnership nor defendant White has reimbursed the bankrupt for any part thereof, nor contributed any portion thereof, despite due demand therefor.

XXII.

That defendant White has failed and neglected to contribute to the partnership his agreed capital contribution in the sum of Sixty-five Thousand and no/100 Dollars (\$65,000.00), or any part thereof, referred to in paragraph XI hereof.

XXIII.

That there are now, and as of the date of filing said petition in bankruptcy against the bankrupt, to wit, August 6, 1947, there were, partnership debts and liabilities in excess of Fifty Thousand and no/100 Dollars (\$50,000.00).

XXIV.

That the bankrupt has duly performed all the

Trustee's Exhibit No. 10—(Continued)

conditions of said partnership agreement on his part.

XXV.

That by reason of the aforesaid acts and conduct of defendants White and of Angel Motors (Film-land Motors), the business and good-will of said partnership have been totally destroyed, and the bankrupt's right, title and interest therein have been rendered entirely valueless; that by reason thereof, the bankrupt has been damaged in the sum of Fifty Thousand and no/100 Dollars (\$50,000.00).

XXVI.

That the defendant Al Herd, Inc., is a corporation organized and existing under and by virtue of the laws of California, with its principal place of business in the County of Los Angeles, and that said defendant and the Doe defendants have or claim to have some interest in and to the said lease, the White lease and the demised premises, which interest is adverse or subordinate to that of the partnership; and they have been named defendants in order that their rights may be fully determined herein.

XXVII.

That defendant White has failed to render to the bankrupt or plaintiff any accounting of his acts and conduct subsequent to his taking of possession of said demised premises, and his operation of said business, despite due demand therefor.

Trustee's Exhibit No. 10—(Continued)

Wherefore, plaintiff prays judgment:

- (a) Dissolving said partnership;
- (b) Requiring defendant White to account for all acts, transactions, matters and happenings pertaining to and arising out of said partnership;
- (c) Requiring defendant White to make contribution in accordance with Section 2434 (d) and (e) of the Civil Code, and also of the unpaid capital contribution referred to in paragraph XXII hereof;
- (d) Requiring defendant White to reimburse plaintiff to the extent of one-half of the amounts personally paid by the bankrupt on account of partnership liabilities, as alleged in paragraphs XX and XXI hereof;
- (e) Requiring defendant White to account for the funds, checks and instruments for the payment of money and other property belonging to the partnership and taken and converted by him to his own use, or received by him;
- (f) Requiring defendant White to account for the profits, gains, issues and emoluments resulting from his wrongful procurement of the White lease to his nominee, to wit, Angel Motors (Filmland Motors) and his wrongful operation of the business upon the demised premises for his own benefit;
- (g) Adjudging that the right, title and interest of defendants White and Angel Motors (Filmland Motors) or either of them, in and to the White lease and any renewals or extensions thereof, and in and

Trustee's Exhibit No. 10—(Continued)

to the demised premises, be held for the benefit of said partnership;

(h) Directing the sale of all partnership assets and the distribution of the proceeds to partnership creditors in payment of their claims;

(i) Enjoining the defendants from making or suffering any transfer or other disposition of partnership assets, directly or indirectly;

(j) Appointing a receiver pendente lite, and to carry out the provisions of the final judgment and decree to be entered herein;

(k) Appointing a referee to take and state the account of said partners;

(l) Adjudging that plaintiff recover of defendants White and Filmland Motors the sum of Fifty Thousand and no/100 Dollars (\$50,000.00) as damages; and

(m) Granting plaintiff such other and further relief as may be just and equitable.

MARVIN WELLINS, and

DANIEL A. WEBER,

By /s/ MARVIN WELLINS,

Attorneys for Plaintiff.

Trustee's Exhibit No. 10—(Continued)

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 542157

FRANCIS F. QUITTNER, as Trustee in Bank-
ruptcy of AL HERD, Bankrupt,
Plaintiff,

vs.

JOSEPH G. WHITE, et al.,
Defendants.

ANSWER OF DEFENDANTS JOSEPH G.
WHITE AND FILMLAND MOTORS

Defendants Joseph G. White and Filmland Motors, a California corporation, in answer to plaintiff's complaint, admit, deny and allege, as follows:

I.

Defendants have no information or belief on the subject sufficient to enable them to answer thereto, and for the want of such information and belief, deny generally and specifically each and all of the allegations contained in paragraphs VII and VIII.

II.

Deny generally and specifically each and all of the allegations contained in paragraphs X, XI, XII, XIII and XIV.

III.

Admit that a corporation was organized under

Trustee's Exhibit No. 10—(Continued)

the laws of the State of California, known as Angeles Motors; that the name was subsequently changed to Filmland Motors, named as defendant herein. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XV.

IV.

Deny generally and specifically each and all of the allegations contained in paragraphs XVI, XVII and XVIII.

V.

Allege that defendant Filmland Motors occupied the premises theretofore occupied by one Al Herd, pursuant to a lease obtained by said defendant Filmland Motors. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XIX.

VI.

Deny generally and specifically each and all of the allegations contained in paragraph XX.

VII.

Admit that defendant Joseph G. White has not paid any of the sum referred to in paragraph XX. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XXI.

VIII.

Admit that defendant White has not paid the sum of \$65,000.00, or any part thereof, to the

Trustee's Exhibit No. 10—(Continued)
alleged partnership. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XXII.

IX.

Deny generally and specifically each and all of the allegations contained in paragraph XXIII.

X.

Allege that there was no partnership agreement in which the defendant White was a partner. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XXIV.

XI.

Deny generally and specifically each and all of the allegations contained in paragraph XXV.

XII.

Admit that Al Herd, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Los Angeles. Except as herein admitted, deny generally and specifically each and all of the allegations contained in paragraph XXVI.

XIII.

Admit that defendant White has not rendered to the plaintiff or to the bankrupt any accounting. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XXVII.

Trustee's Exhibit No. 10—(Continued)

Wherefore, defendants pray judgment that plaintiff take nothing by his action, and that defendants be given judgment for their costs and disbursements herein, and for such other and further relief as the Court deems proper.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Defendants White and Filmland
Motors.

State of California,
County of Los Angeles—ss.

Joseph White being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOSEPH G. WHITE.

Subscribed and sworn to before me this 9th day of April, 1948.

[Seal] /s/ MARGARET L. DAVIS,
Notary Public in and for the County of Los Angeles, State of California.

Trustee's Exhibit No. 10—(Continued)

(Affidavit of Service by Mail—1013a, C.C.P.)

State of California,

County of Los Angeles—ss.

Charlotte R. Cohen, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business-residence is: 604 Union Bank Bldg., Los Angeles, that on the 9th day of April, 1948, affiant served the within answer on the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said plaintiff at the residence/office address of said attorney, as follows: Marvin Wellins and Daniel A. Weber, Attorneys at Law, Suite 720, 417 So. Hill Street, Los Angeles 13, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ CHARLOTTE R. COHEN.

Trustee's Exhibit No. 10—(Continued)

Subscribed and sworn to before me this 9th day of April, 1948.

[Seal] /s/ MARGARET L. DAVIS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed April 12, 1948, Superior Court.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 542157

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of AL HERD, Bankrupt,
Plaintiff,

vs.

JOSEPH G. WHITE, et al.,
Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial on March 14, 1949, in Department 58 of the above-entitled court and during the trial was transferred to Department 19 of the above-entitled court, the Honorable Clarke Edwin Stephens, judge presiding, sitting without a jury, a jury having been expressly waived. Marvin Wellins and Daniel A. Weber, appeared as attorneys for plaintiff, and Fred Horo-

Trustee's Exhibit No. 10—(Continued)

witz and Alvin F. Howard appeared as attorneys for defendants. The cause was tried on March 14, 15, 16, 17, 30, 31; April 4, 5, 6, 8, 11, 12, 13 and 15, 1949. Evidence both oral and documentary was introduced on behalf of plaintiff and defendants, and the court having considered the evidence and heard the arguments of counsel and being fully advised, makes the following findings of fact:

I.

That the allegations of paragraph I, II, III, IV and V of the complaint are true.

II.

That it is true that on or about November 27, 1945, one A. F. Rosen and Gertrude Rosen, as sublessors, and the bankrupt, as sublessee, entered into a written sublease, bearing said date, whereby said sublessor leased unto said sublessee the buildings and premises located at and commonly known as 7077 Sunset Boulevard in the City of Los Angeles, State of California, for a term commencing on said date and expiring on January 31, 1947, with an option therein contained in favor of said sublessor for an additional year thereafter.

III.

It is true that pursuant to the terms of said lease, the term thereof was extended for an additional year.

Trustee's Exhibit No. 10—(Continued)

IV.

It is not true that in and during the month of May, 1947, or at any other time or at all, the bankrupt and the defendant, Joseph G. White, entered into any oral agreement of partnership of any nature whatsoever.

V.

That each and all of the allegations of paragraph X of the complaint are untrue.

VI.

That each and all of the allegations of paragraph XI of the complaint are untrue.

VII.

That the allegations of paragraphs XII and XIII of the complaint are untrue.

VIII.

It is not true that there existed any partnership agreement between defendant White and the bankrupt.

IX.

That the allegations of paragraph XIV of the complaint are untrue.

X.

All of the allegations of paragraph XV are untrue, except it is true that a corporation was organized under the laws of the State of California, known as "Angel Motors"; that the name of said

Trustee's Exhibit No. 10—(Continued)
corporation was subsequently changed to "Filmland Motors," named as one of the defendants herein.

XI.

That the allegations of paragraphs XVI, XVII and XVIII are untrue.

XII.

It is true that the defendant, Filmland Motors, occupied the premises theretofore occupied by the bankrupt, pursuant to a lease obtained by said defendant, Filmland Motors. That all of the other allegations of paragraph XIX are untrue.

XIII.

That the allegations of paragraph XX are untrue.

XIV.

It is true that defendant White has not paid any of the debts of the bankrupt. It is true that the defendant White did not contribute to any alleged partnership the sum of \$65,000.00, or any part thereof. It is not true that the defendant White agreed to contribute to any partnership as agreed capital contribution, or otherwise, the sum of \$65,000.00, or any part thereof, or any other sum.

XV.

It is true that at the date of the filing of the petition in bankruptcy against the bankrupt, to wit, August 6, 1947, there existed debts and liabilities of the bankrupt in excess of \$50,000.00. It is

Trustee's Exhibit No. 10—(Continued)

not true that said debts were partnership debts.

XVI.

It is not true that there was any partnership agreement, written or oral, between the bankrupt and defendant White.

XVII.

It is not true that by reason of any act or conduct on the part of defendants White and Film-land Motors, or either of them, the business and good-will of the bankrupt have been totally or partially destroyed.

XVIII.

It is true that Al Herd, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Los Angeles, and it is further true that the sublease between Rosen and Film-land Motors expired on January 31, 1948, and that neither of the defendants has had possession of said premises from and after said date.

XIX.

It is true that the defendant White has not rendered to the bankrupt or plaintiff any accounting of any nature whatsoever.

Trustee's Exhibit No. 10—(Continued)

From the Foregoing Findings of Fact, the Court
Makes the Following Conclusions of Law:

I.

The plaintiff is entitled to take nothing against
the defendants or either of them.

II.

That the defendants are entitled to a judgment
against the plaintiff for their costs and disburse-
ments herein.

Dated: May 16, 1949.

/s/ CLARKE EDWIN STEPHENS,
Judge of the
Superior Court.

By Designation and Assignment.

[Endorsed]: Filed May 16, 1948, Superior
Court.

Trustee's Exhibit No. 10—(Continued)

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 542157

FRANCIS F. QUITTNER, as Trustee in Bank-
ruptcy of AL HERD, Bankrupt,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

JUDGMENT

This cause came on regularly for trial on March 14, 1949, in Department 58 of the above-entitled court and during the trial was transferred to Department 19 of the above-entitled court, the Honorable Clarke Edwin Stephens, judge presiding, sitting without a jury, a jury having been expressly waived. Marvin Wellins and Daniel A. Weber appeared as attorneys for plaintiff, and Fred Horowitz and Alvin F. Howard appeared as attorneys for defendants. The cause was tried on March 14, 15, 16, 17, 30, 31; April 4, 5, 6, 8, 11, 12, 13 and 15, 1949. Evidence both oral and documentary was introduced on behalf of plaintiff and defendants, and the cause having been submitted for decision and the court having heretofore made and caused to be filed its written findings of fact and conclusions of law, It Is Hereby Ordered, Adjudged and Decreed:

Trustee's Exhibit No. 10—(Continued)

I.

That plaintiff, Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, bankrupt, take nothing against the defendants Joseph G. White and Film-land Motors, a California corporation.

II.

That defendants, Joseph G. White and Film-land Motors, do have and recover of and from the plaintiff, Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, bankrupt, their costs and disbursements taxed in the sum of \$11.00.

Dated: May 16, 1949.

/s/ CLARKE EDWIN STEPHENS,
Judge of the
Superior Court.

By Designation and Assignment.

[Endorsed]: Filed and entered May 16, 1949,
Superior Court.

[Endorsed]: Filed October 4, 1949. (Exhibit
No. 10.)

TRUSTEE'S EXHIBIT No. 12

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 45176

In the Matter of

AL HERD,

Bankrupt.

STIPULATION WITHDRAWING CLAIM OF
GEORGE L. GIBBONS

Whereas, by order of Honorable Benno M. Brink, Referee in Bankruptcy, dated May 25, 1948, Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt, was authorized to settle and compromise the action heretofore brought by said Trustee against George L. Gibbons in the United States District Court, Southern District of California, Central Division, bearing case No. 7870-Y, upon payment by said Gibbons to the Trustee of the sum of \$3,000.00 in cash, and upon execution by said Gibbons of an assignment to said Trustee of all his right, title and interest in and to any recovery by said Gibbons in an action now pending in the Superior Court of Los Angeles County, State of California, bearing case No. 533306; and

Whereas, by the terms of said settlement it was provided that the claim hereinafter mentioned, filed in these proceedings, be withdrawn without prejudice to any rights which the said George L. Gibbons may have against the bankrupt personally;

It Is Hereby Stipulated and Agreed by the undersigned that the claim of George L. Gibbons in the sum of \$19,500.00, heretofore filed with the Referee in Bankruptcy in these proceedings, be, and the same is hereby withdrawn without prejudice to any rights which said claimant may have against the bankrupt personally.

Dated: June 23, 1948.

MARVIN WELLINS, and

DANIEL A. WEBER,

By /s/ DANIEL A. WEBER,
Attorneys for Trustee.

CARL TISOR, and

GEORGE M. WIENER,

By /s/ GEORGE M. WIENER,
Attorneys for Claimant.

It is so ordered. July 14, 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed July 14, 1948, B. M. Brink,
Referee.

[Endorsed]: Filed January 27, 1950. (Exhibit
No. 12.)



after date, without grace, 9
 promise to pay to the order of Joe. Lebelte.
 Fifty Dollars and 25/100 Dollars
 for Value received, with interest from date at the rate of _____ percent per annum until paid
 Principal and interest payable in Lawful Money of the United States
 at _____
 and in case suit is instituted to collect this note or any portion thereof, _____ promise to
 pay such additional sum as the Court may adjudge reasonable as Attorneys fees in said suit.

No. Due Dec 19-47 7677 Street Block
 Ed. Lebelte.
 Endorsed: Filed July 20, 1950.

TRUSTEE'S EXHIBIT NO. 16C



\$5000⁰⁰ thirty after date, without grace, May 19th 1947
 promise to pay to the order of S. L. Lippold
 Five Thousand and 00/100 Dollars
 For Value received, with interest from date at the rate of _____ percent per annum until paid
 Principal and interest payable in Lawful Money of the United States
 at _____
 and in case suit is instituted to collect this note or any portion thereof, _____ promise to
 pay such additional sum as the Court may adjudge reasonable as Attorneys fees in said suit.

No. #1 - Due June 19th
 [Endorsed]: Filed July 20, 1947
 Witness: William Blount



[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 78, inclusive, contain the original Petition for Involuntary Bankruptcy; Order of General Reference; Adjudication of Bankruptcy; Referee's Certificate on Petition for Review of Order in re Demand of Joseph G. White for Repayment of Money Paid to Trustee in Bankruptcy; Petition to Quiet Title to Funds in the Possession of the Trustee; Order to Show Cause to Quiet Title to Funds in Possession of Trustee; Amended Answer to Order to Show Cause; Trustee's Reply to Amended Answer to Respondent White in Proceedings to Quiet Title; Findings of Fact and Conclusions of Law in Proceedings to Quiet Title; Order Approving Trustee's Petition to Quiet Title to Funds in Trustee's Possession; Petition for Review; Order Affirming Referee Brink's Order Dated April 5, 1950, Quieting Trustee's Title to Funds in His Possession; Notice of Appeal; Statement on Cash Deposit, etc.; Statement of Points on Which Appellant Intends to Rely on Appeal; Designation of Record on Appeal and Appellee's Designation of Additional Matters and Portions to be Contained in Record on Appeal which, together with Original Trustee's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 16C and 16H and White's Exhibit 2, and original reporter's transcripts of proceedings

on October 4, 1949, January 27 and 31, 1950, in three volumes, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 9th day of February, A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12850. United States Court of Appeals for the Ninth Circuit. Joseph G. White, Appellant, vs. Francis F. Quittner, Trustee in Bankruptcy of the Estate of Al Herd, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 12, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 12850.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH G. WHITE,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bankruptcy in the
Estate of Al Herd, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

FRED HOROWITZ,

ALVIN F. HOWARD,

1200 Chapman Building,
Los Angeles 14, California,
Attorneys for Appellant.



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No. 12850.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH G. WHITE,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bankruptcy in the
Estate of Al Herd, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

Preliminary Statement.

Joseph G. White, appellant herein, was respondent below, and, for convenience, will be hereinafter referred to as "White." This case grows out of a legal action instituted in the California State Court by one George L. Gibbons against White, which action is hereinafter referred to as "the Gibbons suit." While the Gibbons suit was pending against White, the trustee in bankruptcy, appellee herein, made a deal with Gibbons whereby the trustee became the real party in interest as plaintiff in the Gibbons action. The trustee did not reveal this fact to White so as to prevent White from having an opportunity to assert defenses available against the

trustee. The purpose of the trustee is described by his attorneys in their petition for fees, as follows:

“Preferring not to bring about a change in parties in the Gibbons suit against White by substitution of the trustee as plaintiff (with consequent danger of affording White an opportunity to offset claims assertable against the trustee but not against Gibbons), petitioners elected to continue the action in the name of Gibbons and to have the trustee take an assignment of the entire proceeds which may be recovered in said action.” [Quotation from an allegation of White, appearing at p. 10 of the Transcript, which allegation was admitted by the trustee at p. 16 of the Transcript.]

After discovery of the facts by White, the matter was brought to the attention of the bankruptcy court, which held that White should not have been so denied an opportunity to assert his claims, but that he was not prejudiced thereby, because he had no valid claim to assert. White here appeals on the ground that he was prejudiced because he did have a valid claim to assert against the trustee, as set forth in detail herein.

AUTHORITY FOR JURISDICTION OF THIS COURT.

U. S. C. A., Title 11, Sec. 47;

Coursey v. Internat'l Harvester, 109 F. 2d 774,
779.

Statement of the Case.

(White has not raised any issue in this appeal as to whether the Findings of Fact are supported by the evidence and no references will be made to any evidence. All references supporting statements of fact will be to the Findings of Fact.)

For a considerable period prior to these bankruptcy proceedings, Herd, the bankrupt, was borrowing money from one George Gibbons [Tr. p. 35]. About 3 months before bankruptcy proceedings were started, Gibbons brought action against the bankrupt to collect on said loans and attached the bankrupt's property [Tr. p. 35]. Several weeks thereafter White, as gratuitous accommodation to the bankrupt gave Gibbons a 30 day accommodation note in the sum of \$5,000 [Tr. p. 35]. At or about this same time White, as a further accommodation to the bankrupt, gave Morris Plan Bank his note for \$25,000 and the bankrupt gave White a \$30,000 non-negotiable note as evidence of the bankrupt's liability to White on the aforesaid two accommodation notes [Tr. p. 42].

At the date of bankruptcy, August 6, 1947, no payments had been made on any of the foregoing notes and Gibbons was the owner and holder of White's \$5,000 accommodation note [Tr. p. 42].

One week after bankruptcy Gibbons commenced action (the Gibbons suit) in the Superior Court in and for the County of Los Angeles to collect on White's aforesaid accommodation note [Tr. p. 35]. Gibbons was represented in said action by the law firm of Jones & Wiener. While the Gibbons suit was pending against White, the

trustee brought an action against Gibbons in the United States District Court. This action was based on two claims: first, the trustee claimed that the aforesaid \$5,000 note delivered to Gibbons was a preference, and second, the trustee claimed that the aforesaid loans by Gibbons to the bankrupt were at usurious rates of interest [Tr. p. 36].

In May of 1948 the trustee made a settlement with Gibbons whereby it was agreed that Gibbons would waive a claim in the sum of \$19,500 which he had filed against the estate, pay the trustee \$3,000 in cash, and that the trustee should have all of Gibbons' right, title and interest in the aforesaid \$5,000 note [Tr. pp. 36 and 38].

The trustee then prosecuted the Gibbons action for his own benefit. The trustee, so as to avoid affording White an opportunity to assert possible claims which might have been assertable against the trustee, but not against Gibbons, did not disclose to White the interest of the trustee in said \$5,000 note or in the Gibbons action [Tr. p. 36]. The trustee's failure to disclose his interest in said action prevented White from asserting claims which may have existed in his favor against the trustee, and White was entitled to have an opportunity to assert said claims [Tr. p. 44].

The attorneys for the trustee had themselves substituted for Jones & Wiener as attorneys for Gibbons and on or about July 15, 1948, ostensibly as attorneys for Gibbons, but actually as attorneys for the trustee, secured a summary judgment against White in the Gibbons action [Tr. p. 39]. Said judgment was for the \$5,000, plus attorney's fees and costs, or the total sum of \$6,220, which White paid [Tr. p. 40] without having acquired

any knowledge of the trustee's interest therein [Tr. p. 43].

White then acquired knowledge that the trustee had been the real party in interest in the Gibbons action and that he had been deprived of his right to assert claims against the trustee therein. Upon White's assertion of this fact, the trustee initiated the proceedings which are now before this court as set forth in the following paragraphs.

Pleadings Disclosing Jurisdiction.

This matter was initiated by an Order to Show Cause [Tr. p. 5] issued by the Referee in Bankruptcy herein upon the Petition of the Trustee herein [Tr. p. 3]. The Order to Show Cause directed White to set forth any claims which he may have to any funds in the hands of the trustee. White set forth a claim to a sum of \$6,220, then in the hands of the trustee, by an Amended Answer to Order to Show Cause [Tr. p. 7]. The trustee then joined issue by filing Trustee's Reply to Amended Answer of White in Proceedings to Quiet Title [Tr. p. 13.]

A hearing was had before the Referee upon the foregoing pleadings and, after oral and documentary evidence had been received by him, he decided that White had no interest in said sum of \$6,220 and made Findings of Fact [Tr. p. 35] and Conclusions of Law [Tr. p. 44] and an order based thereon [Tr. p. 45] dated April 5, 1950.

On April 14, 1950, White filed a Petition for Review [Tr. p. 46] and on June 22, 1950, the Referee filed his Certificate on Petition for Review [Tr. p. 51].

A hearing was then had before the Hon. Benjamin Harrison, Judge of the United States District Court for the Central Division of the Southern District of California, and by an order [Tr. p. 60] dated December 4, 1950, the District Court adopted the aforesaid Findings of Fact and Conclusions of Law of the Referee and affirmed the Referee's decision.

On January 2, 1951, White filed a Notice of Appeal [Tr. p. 62] and Statement on Cash Deposit [Tr. p. 63]. On January 11, 1951, White filed a Statement of Points on Which Appellant Intends to Rely on Appeal [Tr. p. 64] and a Designation of the Portions of the Record to Be Contained in Record on Appeal [Tr. p. 65] in the District Court and subsequently a similar Statement of Points Upon Which Appellant Intends to Rely and Designation of the Record were filed in this court.

Specification of Errors.

1. It was error of law for the court below to conclude that White had no right to recoupment against the trustee.

2. It was error of law for the court below to hold that the settlement made between the trustee and Gibbons did not have the effect of discharging the \$5,000 note.

Argument re Recoupment.

Recoupment is defined in the case of *Howard Johnson v. Tucker*, 157 F. 2d 959, where the court states:

“Recoupment is the act of rebating or recouping a part of a claim upon which one is sued by means of a legal or equitable right resulting from a counterclaim arising out of the same transaction. 57 Corpus Juris, Setoff and Recoupment, Sec. 1. It differs from a setoff, in that ‘A setoff is a counter demand which a defendant holds against a plaintiff arising out of a transaction extrinsic of plaintiff’s cause of action.’ *Id.* Sec. 2. Setoff is of statutory origin and depends for application generally on statutory provisions. *Id.* Sec. 3 and ff. Recoupment exists at common law and in equity and rests on the justice of settling both sides of a transaction at once as a mutual matter.”

Recoupment is also explained in the case of *Crossett Lumber Co. v. U. S.*, 87 F. 2d 930, where the court says:

“The ordinary subject-matter of recoupment is a claim arising directly from the particular contract sued upon. Familiar examples are where the defendant in an action to recover the purchase price of goods sold with warranty sets up in defense a breach of warranty, *C. Aultman & Co. v. Torrey*, 55 Minn. 492, 57 N. W. 211, or where in an action to foreclose a purchase money mortgage the defendant recoups because of the vendor’s fraud in inducing the purchase. *Kaup v. Schinstock*, 88 Neb. 95, 129 N. W. 184; *Williams v. Neely* (C. C. A. 8), 134 F. 1, 69 L. R. A. 232. Recoupment, however, is not necessarily so limited. In *Ward v. Alpine Tp.*, 204 Mich. 619, 171 N. W. 446, 450, in an action in

assumpsit against a township for the conversion of materials which had been furnished by plaintiff in the construction of a bridge, it was held that the defendant could recoup for damages sustained by reason of the plaintiff's nonperformance of the contract. That case contains the following quotation from *Waterman on Setoff and Recoupment* (2d Ed.), p. 480, as to how recoupment is distinguished from setoff: 'First, in being confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought; second, in having no regard to whether or not such matter be liquidated or unliquidated; and third, that the judgment is not the subject of statutory regulation, but controlled by the rules of the common law. * * * It is sufficient that the counterclaims arise out of the same subject-matter, and that they are susceptible of adjustment in one action.' "

In the case of *Mills v. United States*, 35 Fed. Supp. 738, 739, it was said that:

"The doctrine of recoupment is not limited to a claim arising directly from the particular contract sued upon. It is sufficient if it arises out of the same subject matter, and that the claims are susceptible of adjustment in one action."

Recoupment is not limited by Section 68, or any section, of the Bankruptcy Act and the doctrine applies in suits by or against a trustee in bankruptcy to the same extent and in the same manner as in other cases. This is

pointed out in the two standard treatises on bankruptcy as follows:

Collier on Bankruptcy, 14th Ed., Sec. 68.03:

“Certainly in any suit or action between the estate and another, the defendant should be entitled to show that because of matters arising out of the transaction sued on, he is not liable in full for the plaintiff’s claim. There is no element of preference here or of an independent claim to be offset, but merely an arrival at a just and proper liability on the main issue, and this would seem permissible without any reference to Sec. 68.”

Remington, Vol. 4, 5th Ed., Sec. 1435:

“Setoff must be distinguished from recoupment. The rule that property passes to the trustee subject to the equities enables a claim in recoupment to be asserted by or against him. Section 68, 11 U. S. C. A., Sec. 108, is not involved.”

The rule is also pointed out in the matter of *In re Monongahela Rye Liquors*, 141 F. 2d 864, at p. 869, where the court said:

“And in *Bull v. U. S.*, 295 U. S. 247, it is said (295 U. S. p. 262, 55 S. Ct. 700, 79 L. Ed. 1421) that ‘recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff’s action is grounded.’ The rule of recoupment in bankruptcy derives from the rule that the trustee takes the bankrupt’s property subject to the equities therein. It does not attach by reason of the setoff provisions of Sec. 68, sub. a. 4 *Remington on Bankruptcy*, 5th Ed., Sec. 1435.”

A defendant is entitled to make a recoupment wherever his claim arises out of the same subject or matter as that upon which the plaintiff bases his claim. Here the trustee based his claim against White upon a \$5,000 note. White's claim in recoupment is based on his rights as accommodating party on the same \$5,000 note. Both claims arise out of the same subject matter. Because this note was an accommodation note it might be well to make a brief general statement concerning the nature of accommodation paper:

"Accommodation paper is a bill or note to which the acceptor, drawer, maker or endorser has put his name without consideration for the purpose of accommodating by a loan of his credit some other person who is to provide for the bill or note when it falls due."

11 *C. J. S.* 286.

"An accommodating party is one who has signed the instrument as maker, drawer, acceptor or endorser without receiving value therefor and for the purpose of lending his name to some other person."

11 *C. J. S.* 287.

"An accommodated party is one to whom the credit of the accommodating party is loaned."

11 *C. J. S.* 292.

"Both at common law and under the negotiable instruments act the party for whose benefit accommodation paper has been made acquires no rights against and is not entitled to sue the accommodation party, the absence of consideration being a defense to such an action."

11 *C. J. S.* 300.

“Where a bill or note has been made, accepted or endorsed for the benefit of one of the members of the firm, the firm, although purchasers for value before maturity, cannot maintain an action thereon against the accommodation party because the position of the firm can be no better than that of the partner who is the accommodated party.”

11 C. J. S. 302.

“The receiver [of a bank] is not entitled to recover on a note executed for the accommodation of the bank.”

Bosworth v. Cady, 72 F. 2d 62.

There was but one subject matter involved in the Gibbons action and that was Gibbons' financing of the bankrupt. Gibbons was foreclosing on the bankrupt, and White gratuitously came to the bankrupt's aid with an accommodation note. The bankrupt, and not White, was the party ultimately liable on the note. When bankruptcy ensued, the trustee found that at the time the note was given, Herd was not indebted to Gibbons, and in fact that Gibbons was indebted to the bankrupt because of usury. Gibbons recognized these facts and disgorged his ill-gotten gains, including the accommodation note, to the trustee. Under such circumstances can it be said that White is indebted to the trustee? Or that the trustee's interest in the note and White's right to have the note paid by the accommodated party do not arise out of the same subject matter?

The Referee's Conclusion of Law on this point [Tr. p. 44], adopted by the District Court, emphasized that the matters asserted by White and the trustee's claims were

not "mutual debts or mutual credits." But mutuality is a requirement of Section 68 of the Bankruptcy Act which clearly has no application to a claim in recoupment—the only requirement for such a claim in recoupment being that it arise out of the same subject matter as the plaintiff's claim.

Since White contends, and it has been found by the court below, that White was prevented by the trustee from urging his claim in the California State Court, his rights of recoupment under the State law should be considered. The State and Federal rules are the same. The California law is plain that a defendant is allowed to recoup on account of any claims arising out of the same transaction as that upon which plaintiff's action is based. In *Stern v. Sunset Road Oil Co.*, 47 Cal. App. 334, 341, the court says:

"We have then a case where the cause of action of the plaintiff on the assigned demands for the delivery of current use oil, and the right of the defendant to recoup on account of the \$60,000 advanced to plaintiff's assignor for development purposes, grew out of and had their origin in the same subject matter and in the same contract. Under such circumstances recoupment was proper."

It should also be noted that the right of recoupment is available against an assignee and was allowed against an assignee in the *Stern v. Sunset Road Oil Co.* case, *supra*.

The doctrine of the *Stern* case was followed in *Bank of America v. Pac. Ready Cut Homes*, 122 Cal. 554, 564, where the court said:

"Appellant contends from that fact that, at the time of said assignment, respondent had no claim

against Frey under this Baileys contract and, therefore, there was an indebtedness against Frey in favor of respondent, arising out of the Baileys contract, existing at the time of or before notice of assignment, and that appellant therefore took the assignment free from any such claim.

“However, the trial court found ‘that said contract between the defendant and said E. R. Frey was in writing bearing the date the said 9th day of May, 1928, but the writing comprised two separate instruments, one relating to the two houses and two garages at Vestal, California, . . . and the other writing referring to the house and garage at Baileys, California; that the two instruments together comprise but a single contract . . . and that it was not intended by defendant and said E. R. Frey that said separate writings should constitute separate and divisible contracts between themselves.’ In view of this finding, although Frey assigned to appellant only that portion of the contract relating to the Vestal job, still that assignment would be subject to the recoupment arising out of the Baileys job, for we have then a case in which the appellant’s cause of action on the assigned Vestal contract, and the right of respondent to recoup for the expense of completing the Baileys job, both grew out of the same subject matter and the same contract. Under such circumstances there could be no doubt of respondent’s right of recoupment for expenses in completing the Baileys job.”

In the case at bar, the trustee’s wrongful concealment of his interest in the Gibbons action prevented White from making recoupment against the trustee.

The doctrine of recoupment is one which is applied on the basis of equity and fair dealing. Thus, in the case of *Howard Johnson v. Tucker*, 177 F. 2d 959, the court allowed a defendant to recoup against a trustee in bankruptcy. There the trustee was suing to recover the sum of \$10,000 which the bankrupt had deposited with one Locar Inc., the lessor of certain property. The lessee of the property was Howard Johnson, who in turn sublet it to the bankrupt. The bankrupt had put up the \$10,000 because Locar, Inc. had refused to make certain improvements until that sum was put up to guarantee payments by Howard Johnson. The bankrupt defaulted in its rental payment to Howard Johnson and Howard Johnson defaulted in its payment to Locar, Inc. After bankruptcy, Locar, Inc. used \$1,500 of the \$10,000 to apply on past due rent and used the balance of \$8,500 to apply on future rentals which were accelerated by the default. Howard Johnson urged in recoupment its claim against the bankrupt because of past due rents and because of breach of agreement to pay future rents. In allowing recoupment the court said (p. 961):

“It would be unjust and inequitable to separate these mutual inchoate obligations in an accounting between these parties. This is true not only as to rents accrued at bankruptcy, but also as to the damages which the Bankruptcy Act substitutes for future rents on rejection of the lease by the trustee in bankruptcy. The petition here asserts that this lease was promptly disclaimed by the trustee on May 2, 1942, a month after the escrow check was used. The claim for damages thus arising is as proper a counterclaim in the settling of this business as the rents accrued, and they ought to be ascertained in the

accounting. The amount of damages for the rejection of the lease by the trustee ought to be limited as it is in the Bankruptcy Act, 11 U. S. C. A., sec. 103, sub. a. But when the damage is ascertained, *because the obligation breached arises out of the same transaction as that on which the trustee is suing, it is not a separate unsecured claim against the estate, but a recoupment which may be defensively asserted in this plenary suit by the trustee.*" (Emphasis supplied.)

Certainly it would be unjust and inequitable to make White pay the sum of \$5,000 to the trustee herein because of a transaction wherein it was agreed by Herd that the obligation was Herd's and not White's and where White gratuitously lent his credit to Herd to hold off Gibbons, and it was later discovered that Gibbons owed Herd nothing. The plain facts are that Gibbons claimed Herd owed him money. White lent Herd his credit to hold off Gibbons. Bankruptcy ensued and the trustee established that Gibbons' claim was unjustifiable and in fact he owed Herd money. This piece of business cannot equitably result in White's being liable to the trustee.

Argument re: Discharge of the Note.

As has been set forth above, the promissory note in question was made by White as an accommodation for the bankrupt and delivered to Gibbons. The note was received by the trustee without endorsement in connection with the settlement of the trustee's action against Gibbons. Since the note was for the accommodation of the bankrupt, as between White and the bankrupt, the bankrupt was the party primarily liable thereon, and, since

this liability of the bankrupt was enforceable against the trustee, as between White and the trustee, the trustee was the party primarily liable thereon.

“When a note is paid after maturity by one who is a co-maker, surety, or otherwise primarily liable for the obligation, the indebtedness is extinguished and a suit based on that instrument may not thereafter be maintained.” (*Gordon v. Wansey*, 21 Cal. 77; *Harris v. King*, 113 Cal. App. 357; *Crystal v. Hutton*, 1 Cal. App. 251; *Dodds v. Spring*, 174 Cal. 412.)

“A different rule, however, prevails when the note is fully paid by a stranger thereto who is not obligated by the terms of the instrument.”

Proctor v. Pyle, 33 Cal. App. 2d 121, 130.

Clearly the trustee was not a stranger to the instrument in question and was not one who was not obligated by the terms of the instrument.

An analogous case is *Harris v. King*, 113 Cal. App. 357, where there were two co-makers on a note, one of whom accommodated the other. The accommodating party “purchased” the note from the payee and it was endorsed to him “without recourse.” It was there held that such a “purchase” extinguished the note. The rule laid down is that performance by the obligor cannot be a purchase.

The rule is also enacted in Section 3200 of the Civil Code of the State of California, as follows:

“Sec. 3200. Instrument; how discharged. A negotiable instrument is discharged—

(1) By payment in due course by or on behalf of the principal debtor;

(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

(3) By the intentional cancellation thereof by the holder;

(4) By any other act which will discharge a simple contract for the payment of money;

(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right. (Added by Stats. 1917, p. 1549.)”

A note is discharged where payment is made by or on behalf of an accommodated party. The rule is set forth in 19 Cal. Jur. 920, as follows:

“‘A negotiable instrument is discharged by payment in due course by or on behalf of the principal debtor.’ This is made the rule by the uniform law and is identical with the rule of the law merchant and the common law in regard to the extinguishment of obligations generally. It is settled that payment at or after maturity by one of several makers, or by a surety on behalf of the makers, or by a third person at the request of the maker, or by or on behalf of an accommodated party, extinguishes the obligation, and no action may be brought upon the instrument itself nor is it thereafter a subject of sale or transfer so as to vest in the transferee any right to sue upon it.”

Conclusion.

The trustee deliberately concealed his interest in the Gibbons action so as to prevent White from asserting any possible claims that he may have had against the trustee. This was definitely determined by the referee and the District Court, and no appeal has been taken from that determination.

White lent Herd his credit so as to hold off one of Herd's creditors. In effect White agreed that if Herd did not pay this creditor, White would make the payment. White guaranteed Herd's payment to Gibbons. When bankruptcy ensued, it was determined that the obligation which White had guaranteed was non-existent, and neither reason nor justice supports the decision below that White is now obligated on this guarantee.

It is respectfully submitted that the judgment should be reversed and the trustee ordered to pay White the sum of \$6,220.

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ALVIN F. HOWARD,

By ALVIN F. HOWARD,

Attorneys for Appellant.

No. 12850

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH G. WHITE,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bankruptcy of the
Estate of Al Herd, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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JOSEPH G. WHITE,

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vs.

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Estate of Al Herd, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

Preliminary Statement.

The appellant seeks a reversal of an order made by Referee Benno M. Brink, affirmed by District Judge Ben Harrison, adjudging that appellant has no valid claim in or to the sum of \$6,220.00 in the possession of the trustee in bankruptcy (appellee). Said amount represents the proceeds paid by the appellant in satisfaction of a judgment against the appellant in an action at law brought in the Superior Court of Los Angeles County, by one George L. Gibbons against the appellant (hereinafter referred to as the "Gibbons action"), based on a promissory note executed and delivered by appellant to Gibbons dated May 19, 1947, in the principal amount of \$5,000.00 [Tr. 389].

The said moneys came into the possession of the trustee by virtue of a written assignment (hereinafter called the "assignment") from Gibbons to the trustee, during the

pendency of the Gibbons action, whereby Gibbons assigned to the trustee "*any sums or proceeds recovered*"* in said action [Tr. 323], in consideration of the trustee's release of all claims held by the trustee against Gibbons and of the trustee's dismissal with prejudice of a suit theretofore brought by the trustee against Gibbons (hereinafter described).

The proceeding below was initiated by an order to show cause (on the trustee's petition therefor) to quiet title to said funds in the trustee's possession [Tr. 3, 5]. An "amended answer" thereto was filed by appellant claiming he was entitled to said moneys [Tr. 7]. Issue was joined by the trustee's "reply" thereto setting forth a number of affirmative defenses to appellant's claim [Tr. 13], which need not be here detailed.

Appellant's position below was that he was at liberty to go behind said judgment in the Gibbons action and to reclaim in the proceeding before the referee the moneys paid by him in satisfaction of the judgment in the Gibbons action because, as the appellant claimed, the trustee did not tell him during the pendency of the Gibbons action that Gibbons had executed said assignment to the trustee. Appellant contended that by reason of the trustee's failure to advise him during the pendency of the Gibbons action of the said assignment by Gibbons to the trustee, he was denied an opportunity to set up an alleged defense or claim in bar, *i. e.*, that appellant executed and delivered the note to Gibbons as an accommodation to the *bankrupt*. Appellant contended that the trustee should return the proceeds because he can in no event stand in any better position than the alleged accommodated party, *i. e.*, the *bankrupt*.

*Italics ours throughout, unless otherwise indicated.

That the trustee acquired the proceeds by virtue of an assigned interest from *Gibbons*, *after* bankruptcy, for a *valuable consideration* furnished by the *trustee*, was claimed by the appellant to be *immaterial*.

The referee examined appellant's claims *on the merits*. After a full trial, during which considerable oral and documentary evidence was introduced, the referee held that appellant did not have and never had any valid defense, claim, set-off or recoupment right as against the trustee, because the latter acquired his interest from *Gibbons* (rather than the bankrupt), *after* bankruptcy, for a valuable consideration furnished by the *trustee* [Tr. 37]. The district judge affirmed this ruling on review.

The appellant's entire brief is premised on the erroneous proposition that a trustee in bankruptcy can *not* acquire any right or interest independently of or superior to those of his bankrupt, even though the trustee may have acquired a right or interest by *assignment* from a *third party*, *after* bankruptcy, and for a *valuable* consideration. Although this is the heart of the case, the appellant's brief will be searched in vain for *any* case which deals with *this* question. The appellant has thus completely evaded the essential issues which this record presents.

The appellant's brief contains a number of misstatements. They will become apparent from our ensuing "Statement of the Case." However, a word might be said at this juncture about one of these misstatements. The appellant asserts that there was a "wrongful concealment" by the trustee of his interest in the action

brought by Gibbons against appellant (App. Op. Br. 13). This charge is completely insupportable. The referee has expressly found, and the district judge has affirmed the finding, that the trustee and his attorneys "*acted honestly and in good faith and in the diligent pursuit of the best interests of the bankrupt estate and its creditors*" [Tr. 36-37].*

Gibbons, the judgment creditor, was not a party to this proceeding.

Statement of the Case.

In our view, appellant's "Statement of the Case" is so distorted and incomplete that a full "Statement of the Case" by appellee should be of service to the court.

On May 19, 1947 (prior to the filing of the involuntary petition against the bankruptcy) appellant executed and delivered to Gibbons his promissory note in the sum of \$5,000.00 to apply on the bankrupt's then existing indebtedness to Gibbons and to cause Gibbons to lift his attachment on the bankrupt's property [Tr. 35, 389]. At or about the same time appellant also executed and delivered a deed of trust note in the amount of \$25,000.00 to the Morris Plan Company of California [Tr. 42] for the bankrupt's account, secured by a deed of trust on real property owned by appellant. The bankrupt thereupon gave appellant his own note for \$30,000.00 [Tr. 389].

*Every single step adopted by the trustee in respect to the assignment, his interest thereunder, and the substitution of the trustee's attorneys as attorneys for plaintiff in the *Gibbons* action, was undertaken pursuant to order of the bankruptcy court, upon written petition of the trustee, spread upon the records of the bankruptcy court. No mention is made of this fact anywhere in the appellant's opening brief.

The referee found that appellant executed the Gibbons note to accommodate the bankrupt [Tr. 35].*

On August 6, 1947, an involuntary petition was filed against the bankrupt [Tr. 42].

On December 24, 1947, the trustee filed an action in the United States District Court, Southern District of California, Central Division, against Gibbons to recover usurious payments claimed by the trustee to have been made by the bankrupt to Gibbons, and to set aside certain alleged preferential transfers by the bankrupt to Gibbons [Tr. 35-36].

The trustee caused a garnishment to be issued in said action which was served on appellant on April 13, 1948, as a debtor of Gibbons on the note executed by appellant to Gibbons [Tr. 36].

On May 3, 1948, the trustee filed a verified petition with the referee for leave to compromise the trustee's said suit against Gibbons then pending in the District Court. Said petition expressly disclosed the *full terms* of the settlement proposal of Gibbons, including in part Gibbons' offer to assign to the trustee either the note executed by the appellant to Gibbons, which was then the subject of a pending action brought by Gibbons against appellant, or in the alternative, to assign to the trustee the proceeds of any recovery by Gibbons therein.

Pursuant to said petition a notice of hearing was thereupon sent by the office of the referee to 134 persons, in-

*The trustee's position was that, far from being an accommodation maker, appellant had an important business interest in executing the note in that he was given an interest in the bankrupt's used car business. The trustee's comprehensive and detailed offer of proof in this regard appears in the record [Tr. 229-240, 241-243].

cluding all listed or known creditors of the bankrupt, which notice was dated May 6, 1948 [Tr. 322]. Said notice sets forth, among other things, the full terms of the proposed compromise [Tr. 320-321], including the proposed alternative assignments to the trustee aforesaid. Said hearing was noticed for May 19, 1948.

On said date, *i. e.*, May 19, 1948, said petition to compromise the trustee's action against Gibbons came on for hearing and the petition was thereupon granted without opposition; and on May 25, 1948, an order was entered by the referee confirming and approving said compromise [Tr. 36, 38].

Pursuant to said order confirming the compromise, Gibbons executed an assignment to the trustee dated "June, 1948," which reads in part as follows [Tr. 323]:

"KNOW YE that I, GEORGE L. GIBBONS, plaintiff in the [Gibbons] action, do hereby transfer, assign and set over unto [the trustee], all my right, title and interest in and to *any sums or proceeds recovered* in said action, whether by way of judgment, settlement or otherwise * * * and I do further covenant and agree that said action be continued in my name as plaintiff."

The trustee thereafter executed a general release to Gibbons and a dismissal with prejudice of the trustee's pending suit in the District Court against Gibbons [Tr. 38].

On June 16, 1948, the trustee filed his petition with the referee for an order authorizing Messrs. Wellins and Weber, the trustee's attorneys, to substitute themselves for Messrs. Jones and Wiener as attorneys for plaintiff

in the Gibbons action. Said petition, like the other documents herein referred to, was filed in the bankruptcy court, and reads in part as follows [Tr. 325]:

“That in view of the fact that this estate is entitled to the *proceeds of any recovery* in said action, petitioner believes it to be in the best interests of this estate that his attorneys, Marvin Wellins and Daniel A. Weber, be substituted as attorneys for the plaintiff, George L. Gibbons, in said pending action against” [appellant].

An order was thereupon entered by the referee on June 16, 1948, authorizing said substitution of attorneys [Tr. 327-328].

On August 16, 1948, the Superior Court ruled that the answer filed by appellant in the Gibbons action was sham and frivolous and granted summary judgment on the note [Tr. 355-356].

Judgment was entered in favor of Gibbons and against appellant on August 25, 1948, and the judgment, plus accumulated execution costs, was satisfied by appellant's payment of the sum of \$6,220.00 on December 14, 1948. Said payment was made in the form of two checks (\$5,000.00 and \$1,220.00). Upon delivery thereof, Mr. Wellins, co-counsel for the trustee, executed a receipt reading in part as follows [Tr. 328-329]:

“THESE CHECKS have been delivered to me *as one of the Attorneys for FRANCIS QUITTNER, as Trustee in Bankruptcy of AL HERD, Bankrupt.* A receipt is acknowledged *on behalf of FRANCIS QUITTNER, as*

said Trustee, and as payment in full of the claim of GEORGE L. GIBBONS *against* JOSEPH WHITE, *et al.*, Case No. 533306, Los Angeles County Superior Court.”*

No creditor’s claim of any kind was ever filed by appellant in the bankruptcy proceedings. No appeal was ever

*The appellant claimed ignorance of the trustee’s interest in the Gibbons recovery despite this plain notice that the trustee was destined to receive these proceeds; and despite the fact that every single measure undertaken by the trustee in connection with the acquisition of the assignment to him, and of his interest in the Gibbons recovery, received the written approval of the referee upon written petition therefor; the fact that the bankruptcy court’s files disclosed the full and complete facts; and despite other evidence which showed that appellant and his attorneys in the *Gibbons* action (who are also his attorneys in this appeal) negotiated with the trustee’s attorneys with the aim of bringing about a dismissal of two then pending suits brought by the trustee against appellant, in consideration of the payment by appellant of the amount of the Gibbons note. The negotiations with the trustee’s attorneys for a *joint settlement of three pending actions against appellant* were admitted by appellant’s counsel.

Mr. Howard, co-counsel for appellant, testified on cross-examination as follows [Tr. 112-113]:

“The Witness: Well, the tenor of the conversation was this, that we made an offer to pay the sum of \$5,000.00 which would be *received by the Trustee in Bankruptcy*; that by virtue of his *attachment* [issued in the trustee’s action against Gibbons] of Mr. White on the Gibbons note we would pay that sum, *the Trustee would get it*, and you, the attorneys for Mr. Gibbons and attorneys for the Trustee, would dismiss with prejudice the action of Quittner v. Rosen [a suit brought by the trustee against appellant and others for unlawful eviction of the bankrupt], as I recall, the action of Quittner v. White [a suit brought by the trustee against appellant for an accounting as an alleged partner of the bankrupt], and the Gibbons action.

Q. By Mr. Wellins: Just so we tie it together, when you say Quittner v. Rosen, that was the unlawful eviction case, and the Quittner v. White was the partnership action, and the

taken by appellant from the judgment against him in the Gibbons action [Tr. 40, 41].

The referee expressly found that the interest of the trustee "under and by virtue of said assignment was acquired by the trustee in bankruptcy herein after the filing of the petition in bankruptcy" [Tr. 37]; and that the

other was the promissory note action? A. The Gibbons action.

Q. The action between Gibbons and White? A. Yes. We made that offer, for which there was to be a dismissal with prejudice of *each of those actions.*" [Rep. Tr. p. 34, line 11, to p. 35, line 1.] (Words in brackets supplied.)

Mr. Horowitz, other co-counsel for appellant, also admitted on cross-examination as follows [Tr. 155-156]:

"Q. Isn't it fact that you knew at the time of the second conversation about which you have testified on your direct examination that Mr. Weber and I were speaking to you with a view toward the settlement of three pieces of litigation, the Gibbons suit and the two suits by the trustee against Joseph G. White? A. You see, at the time I had the conversation a summary judgment had not been granted. I wanted to settle that [Gibbons] suit and I said I would pay a certain sum in connection with that suit. I also—and that was in your capacity as attorney for Mr. Gibbons. I also told you at that time I would like and would want the other litigation [the trustee's two suits against the appellant] disposed of and as to the other litigation I didn't propose to pay anything, and never at any time did I offer to pay as much as one cent for the disposition of the other litigation. * * *." (Words in brackets supplied.)

Thus, both denied knowledge that the trustee had an interest in the Gibbons recovery, although both admitted discussing with the trustee's attorneys a joint disposition of three actions, including the Gibbons action, premised upon appellant's payment of \$5,000.00 (the amount of the Gibbons note). According to Mr. Howard, this was to be "received by the trustee * * * by virtue of his attachment" served on appellant as a debtor of Gibbons, issued in the trustee's suit against Gibbons. According to Mr. Horowitz, this sum was to be received by Mr. Wellins "as attorney for *Mr. Gibbons,*" for which Mr. Wellins was expected to deliver, as attorney for the *trustee*, dismissals with prejudice of two suits brought by the trustee against appellant, without payment to the trustee of "as much as one cent"!

trustee “acquired his interest thereunder for a valuable consideration furnished by the trustee” [Tr. 37].

The referee further expressly found as follows:

“That on the date of the filing of the petition in bankruptcy in the above-entitled bankruptcy proceedings, to wit, August 6, 1947, said Gibbons was the owner and holder of said promissory note in the sum of \$5,000.00 executed and delivered by [appellant] to Gibbons; and on said date the trustee in bankruptcy herein had no right, title or interest of any kind in or to said note, or the cause of action evidenced thereby, or the proceeds of any recovery thereon” [Tr. 42].

As a conclusion of law, the referee held:

“The trustee’s claims in and to said assignment and said proceeds are derived from Gibbons and not from the bankrupt” [Tr. 44].

The referee further concluded that appellant’s claims against the bankrupt and the trustee’s interest in the Gibbons recovery “do not involve mutual debts or mutual credits, nor can the matters asserted in the respondent’s amended answer defeat the Trustee’s interest under said assignment or his right to said proceeds” [Tr. 44].

The district judge concurred in the foregoing views and affirmed the referee’s order quieting the trustee’s title in and to the funds in his possession [Tr. 60-62].

Summary of Appellee's Argument.

Appellee contends that the judgment below is eminently proper for the following reasons:

1. The appellant was clearly liable on the note in the Gibbons action. This liability was in no wise affected by the trustee's "purchase" of the assignment of the proceeds from Gibbons. The continuation of the Gibbons action in the name of Gibbons as plaintiff was perfectly proper, and was expressly sanctioned by statute.

2. Even if the *trustee* had prosecuted the Gibbons action in his own name as plaintiff, appellant's claim that he executed the note for the accommodation of the *bankrupt* would have been as *untenable* against the trustee as it was against Gibbons. Since the trustee was the assignee of *Gibbons*, and since he acquired his interest *after* bankruptcy, for a valuable consideration, the trustee could enforce the note *even though the bankrupt could not*.

3. Appellant's alleged claim of recoupment was and is untenable because it is not "in the same right" as that asserted against him. The claims therefore are not "mutual."

POINT I.

The Appellant Was Clearly Liable on the Note in the Gibbons Action. This Liability Was in No Wise Affected by the Trustee's "Purchase" of the Assignment of the Proceeds From Gibbons. The Continuation of the Gibbons Action in the Name of Gibbons as Plaintiff, Was Perfectly Proper, and Was Expressly Sanctioned by Statute.

It is well settled that payee of an accommodation note, who furnishes consideration therefor, is entitled to enforce the same against an accommodation maker, even though the payee knows the note to be accommodation paper (Sec. 3110, California Civil Code; *People's Finance & Thrift Co. v. Moon*, 44 Cal. App. 2d 223.)

Gibbons was the payee of the note. As payee of the note he instituted action thereon against appellant prior to the petition in bankruptcy. Clearly the defense of accommodation maker was not maintainable against Gibbons, the payee thereof, who had furnished consideration for the note, *i. e.*, the lifting of his attachment on the bankrupt's property [Tr. 35].

Among the assets which passed to the trustee were a number of claims against Gibbons which the trustee sought to enforce in the trustee's action against Gibbons in the District Court. In settlement of the trustee's claim against Gibbons, and in consideration of the execution of a general release by the trustee to Gibbons and of the dismissal with prejudice of the trustee's action against Gibbons, Gibbons paid the trustee \$3,000.00 in cash, and gave the

trustee a written assignment of “any sums or proceeds recovered” [Tr. 323] in the Gibbons action, and also agreed to withdraw a claim in the amount of \$19,500.00 which Gibbons had filed in the bankruptcy proceedings [Tr. 387].

The referee thus correctly found on this undisputed evidence that the trustee acquired his interest in the note proceeds from *Gibbons*—*after* bankruptcy—for a *valuable consideration* [Tr. 37, 42, 44], *i. e.*, the compromise, settlement and release of the trustee’s claims against Gibbons. In effect, the trustee purchased said assignment from Gibbons for that “price,” and conversely, Gibbons “purchased” from the trustee his release from all claims and a dismissal of the trustee’s action against him, by giving the trustee the assignment, together with \$3,000.00 in cash, and a stipulation by Gibbons withdrawing his claim in the sum of \$19,500.00 in the bankruptcy proceedings [Tr. 387].

The continuation of the promissory note action in the name of Gibbons, after the delivery of his assignment to the trustee, was expressly authorized and sanctioned under California law. Section 385 of the California Code of Civil Procedure provides that where a plaintiff in a pending action transfers all or any interest therein, “the action or proceeding may be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.”

Under this section the transferee or assignee of a cause of action or of an interest in a pending action, even where he has acquired the plaintiff's *entire* interest,* has a right to continue the action in the original plaintiff's name and to control the future conduct of the action even though the same be conducted in the name of the original plaintiff.

Cully v. Cochran, 107 Cal. App. 525, 529;

Harlan Douglas Co. v. Moncur, 19 Cal. App. 177, 179;

Walker v. Felt, 54 Cal. 386, 387.

It is therefore clear that the continuation of the action in Gibbons' name *was expressly sanctioned by California law*. Nor was the validity or enforceability of Gibbons' cause of action on the note affected by the trustee's "purchase" of the assignment from Gibbons after bankruptcy, for a valuable consideration.

*The instant assignment gave the trustee an interest in the *proceeds* recovered, rather than *title* to the note or cause of action thereon. In our view, it would make no difference in the determination of this case, whether the assignment in terms covered complete title to the note and cause of action.

POINT II.

Even If the Trustee Had Prosecuted the Gibbons Action in His Own Name as Plaintiff, Appellant's Claim That He Executed the Note for the Accommodation of the Bankrupt Would Have Been as Untenable Against the Trustee as It Was Against Gibbons. Since the Trustee Was the Assignee of Gibbons, and Since He Acquired His Interest After Bankruptcy, for a Valuable Consideration, the Trustee Could Enforce the Note Even Though the Bankrupt Could Not.

A trustee in bankruptcy stands in a dual position. To be sure, he possesses certain rights as the representative of the bankrupt. However, the trustee's powers go much further. The trustee "primarily represents the creditors themselves, and in a secondary and restricted sense the bankrupt as well" (4 *Collier on Bankruptcy*, p. 945). The dual status of the trustee arises from the provisions of the Bankruptcy Act (see Secs. 60, 67 and 70 of the Bankruptcy Act).

"The trustee represents the general creditors and in this capacity may assert claims, avoid preferences and collect assets *where the bankrupt, if bankruptcy had not intervened, would be estopped.*" (*In re Gustav Schaeffer Co.* (C. C. A. 6), 103 F. 2d 237, 241; cert. den. 308 U. S. 579.)

In *Collier on Bankruptcy* the rule is thus stated:

"It is quite apparent, therefore, that the (Bankruptcy) Act confers certain rights and powers on the trustee *over and above those accorded the bankrupt and in some cases, the bankrupt's creditors.*" (4 *Collier on Bankruptcy*, p. 950.)

To the same effect see:

In re Kessler, 186 Fed. 127, 130;

Merchants Nat. Bank v. Sexton, 228 U. S. 634,
644, 33 S. Ct. 725;

Schroeter v. Abbott, 185 Cal. 146, 149-150;

4 *Collier on Bankruptcy*, page 945;

In re Hargrove, 64 Fed. Supp. 103, 106.

In *Schroeter v. Abbott*, 185 Cal. 146, the court stated (pp. 149-150):

“Creditors’ rights which are enforceable under State laws accrue to a trustee in bankruptcy, and he may maintain or defend proceedings and collect assets under circumstances where the bankrupt could not be at liberty to act. (*Courtney v. Fidelity Trust Co.*, 219 Fed. 57 . . .’ *In re Kessler*, *supra*; *In re De Novess Shoe Co.*, 210 Fed. 533.) In other words, while the trustee must resort to the courts of the State where the bankrupt resides, he may therein enforce rights and avail himself of remedies which are open to him as a representative of the creditors of the corporation which might *not* be available to the corporation itself. (*Bardes v. Howardan Bank*, 178 U. S. 524 . . .; *Hicks v. Knost*, 178 U. S. 541 . . .).”

Also, the trustee frequently gets title where the bankrupt had *none*.

“. . . the trustee does not always occupy merely the status of the bankrupt, but frequently may get a better title than the bankrupt had, or, in some cases, get title where the bankrupt had none.” (*In re Monticello v. Veneer Co.*, 2 Fed. Supp. 27, 28.)

Thus, the trustee may avoid preferential transfers although the bankrupt could not (Sec. 60, *Bankruptcy Act*).

The trustee may assert either the rights of a lien creditor or of a judgment creditor although neither the bankrupt nor any creditor individually could have exercised such powers (Sec. 70c, *Bankruptcy Act*).

The trustee may avoid liens obtained against the bankrupt's property by legal or equitable proceedings within four months of bankruptcy, although neither the bankrupt nor any creditor would have such power (Sec. 67a, *Bankruptcy Act*; 4 *Collier on Bankruptcy*, pp. 949, 950).

In addition, the trustee may *in his own right* operate a business for the benefit of the estate, or *buy or sell* property in the interests of the estate, and thereby become a creditor *in his own right* and enforce a liability incurred to him without being subjected to payment of any indebtedness, set-off or counterclaim against the bankrupt arising *before* the filing of the petition (4 *Collier on Bankruptcy*, p. 743).

“ . . . claims owed by or to the bankrupt prior to bankruptcy cannot be set off against claims owed by or to the bankrupt's estate (as represented by the receiver or trustee) and arising after bankruptcy.”
(4 *Collier on Bankruptcy*, p. 473.)

It is firmly established that *the date of the filing of the petition in bankruptcy* is the date of “cleavage,” and is the point of reference in determining the right of recoupment against a trustee. Where, as in this case, the rights of the trustee arose *after* bankruptcy, by dint of a contract which the trustee entered into, and the claim sought to be recouped against the trustee arose *before* the filing of the petition, no recoupment can be allowed.

In the case of *White v. Stump*, 266 U. S. 310, the Supreme Court stated the rule as follows (p. 313):

“ . . . the point of time which is to separate the old situation from the new in the bankrupt's affairs is *the date when the petition is filed*. This has been recognized in our decisions. Thus, we have said that the law discloses a purpose ‘to fix the line of cleavage’ with special respect to the conditions existing *when the petition is filed*.”

See also:

Lockhart v. Garden City Bank & Trust Co., 116 F. 2d 658, 661.

It is always necessary to determine, with due regard for “the line of cleavage,” whether the trustee is making a claim *in his own right* or in the right of the *bankrupt*. The case of *In re Kessler*, 186 Fed. 127, is instructive on this point. The court said (p. 130):

“The proper inquiry is *in what right* is any given claim advanced? If it is the bankrupt's claim, then truly the trustee must stand in the bankrupt's shoes; *but if it is his own claim, depending on his own acts created by himself*, or by the statute he does *not* represent the bankrupt, and his rights are not to be measured by those of the bankrupt.”

A case directly in point is *Merchants Nat. Bank v. Sexton*, 228 U. S. 634, 33 S. Ct. 725. In that case a trustee in bankruptcy paid out of estate assets in his hands the sum of \$12,000.00 to the holders of certain collateral notes aggregating the sum of \$39,000.00. The sum of \$12,000.00 represented the amount due upon the indebtedness which the collateral notes were given to secure. Upon making such payment of \$12,000.00 the trustee received the collateral notes.

The court held that the trustee could enforce the collateral notes *even though the bankrupt would not have been allowed to do so*. The court pointed out (33 S. Ct. at p. 728):

“By the effect of the bankruptcy the rights of the parties became fixed.”

There too it was urged that since the bankrupt could not have enforced the collateral notes, the trustee should likewise be precluded from enforcing them. The court answered that if such a contention were upheld, “the situation existing at the time of the adjudication would be seriously changed” (p. 729), and concluded that since the trustee had acquired the collateral notes *after* bankruptcy, he had the right to enforce them even though the bankrupt would not have been permitted to do so (p. 729).

These established bankruptcy principles are controlling here, as the referee and district judge have held. When the petition in bankruptcy was filed, the bankrupt had no title or interest in the note (or its proceeds). *Gibbons owned and held it*. After bankruptcy the trustee acquired his interest in the proceeds of the note—an interest “depending on his (the trustee’s) *own acts* created by himself” (*cf. Kessler case, supra*), to-wit, his making of a contract with Gibbons to take the assigned interest in the note proceeds, plus \$3,000.00 in cash, plus a withdrawal of Gibbons’ claim in bankruptcy, in consideration of the trustee’s delivery of a general release to Gibbons and a dismissal with prejudice of the trustee’s action against Gibbons. No interest in the note or proceeds devolved upon the trustee until he acquired, with the approval of the bankruptcy court, the assignment of the proceeds by way of compromise with Gibbons.

If appellant had any defense or right of recoupment against Gibbons, such a claim might have been good against the trustee. But appellant admittedly has no claim against Gibbons. Gibbons could have recovered on the note and given the proceeds of recovery to anybody he wished. Similarly, he and the trustee were at full liberty to enter into a contract requiring Gibbons to pay such proceeds to the trustee as part of the settlement between the trustee and Gibbons.

POINT III.

Appellant's Alleged Claim of Recoupment Was and Is Untenable Because It Is Not "in the Same Right" as That Asserted Against Him. The Claims Therefore Are Not "Mutual."

Although appellant argued below that he had a valid right of set-off as well as recoupment against the trustee, he has apparently completely abandoned his claim to a "set-off." Such a claim would have to comply with all of the requirements of Section 68 of the Bankruptcy Act.

By styling his claim one of "recoupment" appellant can not exempt himself from the requirement of "mutuality"—a prerequisite to *recoupment as well as set-off*.

The Bankruptcy Act, as such, does not use the word recoupment; nor does it have any particular sections expressly giving rights by way of "recoupment." Similarly, the California statutes do not have any reference to the word "recoupment."

"As used in the California Codes, 'counterclaim' possesses a generic meaning and includes . . . set-off and *recoupment* . . ." (23 *Cal. Jur.* 217; citing *St. Louis National Bank v. Gay*, 101 Cal. 286, and *Roberts v. Donovan*, 70 Cal. 108.)

Under Section 438, California Code of Civil Procedure, a counterclaim can only exist in favor of a defendant and against the plaintiff between whom a several judgment might be had in the action.

Under California law "the right to plead a counterclaim or a set-off must be *reciprocal*, and the claims *mutual*" (23 Cal. Jur. 220; citing *Story, etc., Company v. Story*, 100 Cal. 30, and *Lyon v. Petty*, 65 Cal. 222.)

The federal cases with respect to the requirements of recoupment accord with the California decisions. Several of the federal cases decided under the Bankruptcy Act speak in terms of "counterclaim" and "set-off," and use these terms generically to include the concept of recoupment. They deny recoupment wherever the requirements of mutuality are not satisfied, *i. e.*, claims in the same right, and claims co-existing prior to the filing of the petition in bankruptcy. While it is true that the provisions of Section 68 of the Bankruptcy Act (relating to set-off) do not govern claims which are strictly denominated "recoupment," the element of *mutuality* is nevertheless a prerequisite to such a claim because of its very nature.

The following cases are illustrative of the meaning of "mutuality":

In the case of *Bennett v. Rodman & English*, 2 Fed. Supp. 355 (affirmed as *Bennett v. Louis Bossert & Sons, Inc.*, 62 F. 2d 1064), the trustee sued to recover (as a fraudulent transfer) money paid by the bankrupt while insolvent to the defendant on account of debts owing to the defendant. The defendant sought to set-off a debt owed to him by the bankrupt. This set-off was denied on the ground that the debts were not mutual.

In *United States v. Roth*, 164 F. 2d 575, the court said: "To be mutual the debts or credits 'must be in the same right' " (citing *Sawyer v. Hoge*, 17 Wall. 610, 622; *In re Bush Terminal Co.*, 93 F. 2d 661; *In re Hood v. Brownlee*, *supra*; 4 *Collier Bankruptcy* (14th Ed.) 721). The court held that where a trustee asserts a right conferred upon him for the benefit of creditors under Section 67 of the Bankruptcy Act, rather than as successor in interest of rights of the bankrupt, one cannot off-set a claim owed by the bankrupt. The court said:

"The tax claim asserted by the United States was owed by the bankrupt while the debt it owes * * * is owed to the trustee and was never owed to the bankrupt. Hence the required mutuality of debts is lacking."

In *Hood v. Brownlee*, 62 F. 2d 675, a bank was held not entitled to set-off a debt of the bankrupt against a deposit of the trustee, for the reason that the debt due from the bankrupt to the bank and the debt owing from the bank to the trustee on account of the trustee's deposit were not mutual debts or credits.

"They were not owing by and to the bank 'in the same right.' The claim of the bank arose out of the individual debt of the bankrupt, and the only liability of the trustee with respect thereto was to apply upon it a portion of the assets of the bankrupt estate under the order of the court of bankruptcy. The liability of the bank on the deposit made by the trustee was to the trustee as representative not of the bank alone, but also of the creditors of the bankrupt estate."

In *Alvord v. Ryan*, 212 Fed. 85, it was held that in a suit by a trustee to recover property transferred by the bankrupt to one who held it subject to a trust, there could be no set-off of a debt due from the bankrupt since these claims were not "in the same right."

Similarly it has been held that there is no mutuality where a claim for services rendered to the bankrupt was asserted as a set-off against the claim of a trustee for recovery of a fraudulent transfer, the claims not being in the same right. (*Irving Trust Co. v. Frimmitt*, 1 Fed. Supp. 16; *Lytle v. Andrews*, 34 F. 2d 252.)

The case of *In re Bush Terminal Co.*, 93 F. 2d 661, involved a claim of a taxpayer for taxes paid to the city under protest *after* institution of proceedings for recovery of a tax. The court held that such a claim was not "mutual" with a claim of the city for taxes due from the taxpayer *prior* to institution of such proceedings and could not be set-off. The court said:

"A credit in the trustee arising out of the activities carried on after adjudication has no element of mutuality with a debt owing by the bankrupt to a person with whom the trustee has been doing business."

In *Kaye v. Metz*, 186 Cal. 42, the requirement of *mutuality* was also emphasized. In that case a trustee in bankruptcy of a corporation sued to recover unpaid stock subscriptions. The defendant subscribers sought to interpose as a defense claims which they had as creditors of the corporation. The court denied them the right to assert such claims on the ground of lack of mutuality. The court said (p. 49):

"In order to warrant a set-off 'the debts must be mutual, and the principle of mutuality requires that

the debts should not only be due to and from the same person, but in the same capacity.' 19 Cyc. 894.

"The trustee in bankruptcy held these stock liabilities, as above stated, as a trust fund for the benefit of creditors. They were not held by him in the same capacity as would be the case if the corporation was not insolvent and had in itself sued the stockholder for his subscription; hence, a set-off is not permitted."

The language of the court in the case of *Schroeter v. Abbott*, 185 Cal. 146, is also helpful in demonstrating the similarity of interpretation between California law and federal law in respect to mutuality. In that case the court said as follows (p. 149):

"The trustee is not representing the bankrupt corporation in collecting these unpaid subscriptions, but is representing the creditors. (*In re V. & M. Lumber Co.*, 182 F. 231; *In re Kessler*, 186 F. 127 . . .; *Babbitt v. Read*, 215 F. 395.)"

See also:

H. K. McCann Company v. Week, 115 Cal. App. 393;

McDaniel National Bank v. Bridwell, 74 F. 2d 331, 333;

Peterson v. Lyders, 139 Cal. App. 303, 306;

Garrison v. Edward Brown & Sons, 25 Cal. 2d 473, 477;

Libby v. Hopkins, 104 U. S. 303;

In re Shults, 132 Fed. 573;

Dakin v. Bayley, 290 U. S. 143;

In re Bevins, 165 Fed. 434;

Maryland Casualty Co. v. Parker, 279 Fed. 796.

Thus, one who is sued by a trustee in bankruptcy and attempts either to defeat the trustee's claim, or to diminish it, or to recover affirmatively against the trustee—by way of set-off, counterclaim or recoupment—must in every case meet the requirements of *mutuality*, *i. e.*, the claims must be derived in the same right and they must have been in existence prior to filing the petition in bankruptcy.

In the case at bar, appellant's claim of recoupment is lacking in mutuality because the debt which was the subject of the Gibbons action was a note from appellant to Gibbons. *This is not a situation where appellant's debt was owed to the estate of the bankrupt and the estate owed a debt to appellant.* It was the obligation owed to Gibbons that was collected from appellant.

Mutuality is lacking for the reason that the trustee, having purchased the right to receive the proceeds of the Gibbons' note, received the funds "in the right of" Gibbons. The trustee was not proceeding to collect an account which was owed by the bankrupt at the time of bankruptcy. He was not proceeding "in the right of" the bankrupt. The claim asserted by appellant is a claim which could exist only against the bankrupt (under certain conditions), and not the trustee.

Appellant's Cases Are Completely Inapplicable.

In the case of *Howard Johnson v. Tucker*, 157 F. 2d 959, cited by appellant, the facts are completely at variance with those in the instant case. In that case the trustee was seeking to enforce *a contractual cause of action which the bankrupt held at and prior to the time of filing of the petition in bankruptcy*. In the case at bar, the bankrupt had no cause of action, or title to the note, or right to enforce the note before bankruptcy or at any other time. In that case the trustee did *not* acquire his cause of action after bankruptcy, whereas in the instant case the trustee acquired his interest in the proceeds of the Gibbons note *after* bankruptcy, in pursuance of his duties on behalf of the creditors of the bankrupt estate.

The case of *Stern v. Sunset Road Oil Co.*, 47 Cal. App. 334, cited by appellant, is also not in point. In the *Stern* case plaintiff was an assignee of a railroad company which had a contract with Sunset, the defendant. The contract was partly performed before and partly after notice of the assignment. The court held that it was one entire contract and was not divisible with respect to the part performed before the notice of assignment and that performed after notice of assignment. The court held the contract to be an "entire" contract. Accordingly, Sunset was permitted to assert defenses arising out of alleged breaches of the contract by the railroad company. The facts there involved do not remotely parallel the situation in the case at bar. Here the plaintiff's assignor was Gibbons. Appellant does not seek to assert defenses against *Gibbons*, because appellant admits, and the Superior Court has adjudged, that appellant had no defenses against Gibbons.

Nothing in the *Stern* case alters the rules of recoupment requiring that the claims be mutual, and requiring that the claims which are the subject of recoupment be “in the same right” as those which are the subject of the plaintiff’s cause of action. The *Stern* case is merely an illustration of the rule that an assignee stands in the shoes of his *assignor*, and that where there is an “entire” contract performed in part after the assignment thereof, defenses arising out of a failure of such performance are available to the party sued on such contract.

The proposition contended for by appellant that where the accommodated party acquires the note which was executed for his accommodation, *his transferee* may not enforce the note, adds nothing to the case. However correct this may be as a statement of the law, it is enough to say that the trustee did *not* acquire this note from the bankrupt *nor had the bankrupt ever acquired the note*. The note remained in Gibbons’ hands as payee until the trustee acquired it from Gibbons after bankruptcy for a valuable consideration. Thus the note was *never* acquired by the accommodated party, *i. e.*, the bankrupt.

Furthermore, the trustee was certainly under no obligation to use estate assets to purchase or acquire the note from Gibbons, the payee, in order to thus “buy off” appellant’s liability on the note and afford appellant complete exoneration. Such use of bankruptcy assets, *i. e.*, in the sole interest of appellant, would represent a use of estate assets of the most preferential and wrongful nature. Appellant would thus be the sole recipient or beneficiary of the trustee’s use of estate assets.

The case of *Bosworth v. Cady*, 72 F. 2d 62, was a case involving the receiver of a bank for whose accommodation a note was executed. It was held that the receiver, having received the note directly from the accommodated party, *i. e.*, the bank, took the note subject to whatever defenses were available against it. This situation is hardly comparable to a purchase made by a trustee with bankrupt estate assets after bankruptcy, not from the accommodated party, but from the payee who gave value. In the *Bosworth* case the receiver was suing in the right of the bank from whom it acquired title and not in the right of a third party who paid value for the note.

The case of *Bank of America v. Pac. Ready Cut Homes*, 122 Cal. App. 554, cited by appellant, simply holds that a right of recoupment assertible against an assignor may be asserted *against his assignee*. The trustee's assignor here was *Gibbons*, against whom appellant *had no claim*. We do not dispute that if the trustee had acquired the note from the *bankrupt* before bankruptcy, the trustee would not stand in any better position than the bankrupt.

In the case of *In re Monongahela Rye Liquors*, 141 F. 2d 864, the trustee sought to enforce claims for liquor sold by the *bankrupts* before bankruptcy, in a proceeding brought by the Commonwealth of Pennsylvania to enforce payment of taxes owed by the bankrupt. Obviously such a case is of no aid where the trustee's right stems from his acquisition of an assignment, not from the bankrupt but from a third party after bankruptcy.

Conclusion.

The trustee did *not* acquire the note or proceeds, or any interest therein, from the bankrupt. The bankrupt never had any interest in the note which devolved upon the trustee. In receiving the proceeds, the trustee was *not* acting in the right of the bankrupt. The trustee *purchased* his interest in the proceeds by his own contract with Gibbons after bankruptcy. The appellant concededly had no defense to Gibbons' claim on the note (as the Superior Court adjudged).

The appellant was given his day in court and after a hearing on the merits, the referee determined that he did not have, and never did have, any defense, set-off or recoupment right as against Gibbons or the trustee, and that none could have been maintained in the Gibbons action or in the bankruptcy court. The district judge was in accord with the referee.

In view of the demonstrable lack of merit in the appellant's claim, and of the correctness of the referee's determination as well as that of the district judge, adjudging that on the merits the appellant's claim was not one which was maintainable, or could have been maintained, against Gibbons or the trustee, either in the Gibbons action or in the bankruptcy court, we believe no useful purpose would be served in discussing in this brief the other bars to the appellant's claim asserted in the trustee's pleading [Tr. 13-32].

Respectfully submitted,

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Attorneys for Appellee.

No. 12850.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH G. WHITE,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bankruptcy in the
Estate of Al Herd, Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

For convenience of court, and to be consistent with Appellant's Opening Brief, Appellant is hereinafter referred to as "White" and Appellee as "the Trustee".

The Trustee's Statement of the Case.

Neither White nor the Trustee has questioned the sufficiency of the evidence to sustain the findings of fact of the court below, and a statement of the case must, therefore, be based on the facts found. The Trustee has based his statement on evidentiary matter rather than on the findings and sets forth evidence and argument contrary to the findings. Although the Trustee has designated White's statement of the case as "distorted" and "incomplete", White's statement is based entirely on the findings and the use of such designations is not warranted.

It might be added that since neither White nor the Trustee have made exceptions to the findings there was no need to print the voluminous testimony heard below, and the cost of printing such testimony should be borne by the Trustee, who requested it.

The Trustee objects to White's designation of the Trustee's concealment of his interest as "wrongful". The designation is based on the following findings and conclusions of the court below.

"The Trustee, so as to avoid affording Respondent [White] an opportunity to assert possible claims which might have been assertable against the Trustee but not against Gibbons, did not disclose to Respondent the interest of the Trustee in said \$5000.00 note or in the aforesaid promissory note action." [Finding of Fact V.]

"That on or about July 15, 1948, Messrs. Wellins and Weber, *ostensibly as attorneys for plaintiff, George L. Gibbons, but actually as attorneys for the Trustee herein*, filed a motion for summary judgment in said promissory note action. . . ." [Finding of Fact IX.] (Emphasis supplied.)

"That on or about June 16, 1948, an order was made by the Referee in Bankruptcy herein, authorizing said substitution of attorneys [of Weber and Wellins as attorneys for Gibbons in the place and stead of Jones and Weiner] . . . and the original of said substitution of attorneys . . . was filed in the office of the County Clerk of Los Angeles County on July 19, 1948. At all times Marvin Wellins and Daniel A. Weber represented the Trustee herein in said promissory note action and did not at any time represent George L. Gibbons, the original plaintiff in said action." [Finding of Fact VII.]

“The Trustee herein was the real party in interest as party plaintiff in the action entitled *Gibbons v. White*. . . . The Trustee’s failure to disclose his interest in said action prevented Respondent herein [White] from asserting any offsets, defenses or claims which may have existed in his favor against the Trustee, *and Respondent was entitled to have an opportunity to assert said offsets, defenses and/or claims.*” [Conclusion of Law I.] (Emphasis supplied.)

The Trustee’s “Purchase” of the Gibbon’s Note.

Finding of Fact V-A [Tr. p. 37] declares that the note was “acquired” by the Trustee after bankruptcy for a valuable consideration. That consideration is described in Finding V [Tr. p. 36] and Finding VIII [Tr. p. 38] as a release of the claims asserted by the Trustee in his usury action against Gibbons.

Whether this was a purchase of the note or a discharge of the note depends on whether the Trustee was a party liable thereon or a stranger thereto, as discussed on page 15 and following of White’s opening brief. The Trustee points out that under various circumstances a Trustee stands in a better position than does the bankrupt. However, he does not show why, in prosecuting his action against Gibbons and compromising it, he stood in any better position than the bankrupt. That action was based on a claim of usury assertable by the bankrupt and the Trustee could not assert that claim, as the Trustee implies, under any rights given him as a judgment creditor or as the operator of a business for the benefit of the estate. The Trustee could assert that right only by virtue of his succeeding to the interest of the bankrupt. Furthermore,

the facts are that the note in question was given to Gibbons in payment of the usurious loan at a time when the bankrupt erroneously supposed that he was indebted to Gibbons. Under such circumstances, the bankrupt, as the accommodated party on the note, was entitled to prevent negotiation of the note and to its cancellation. This well-known equity rule is codified in California Civil Code, Section 3412 as follows:

“WHEN CANCELLATION MAY BE ORDERED. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or cancelled.”

Herd's right to delivery or cancellation of the note passed to the Trustee along with Herd's other assets. Under such circumstances, can the Trustee be allowed to “purchase” the note by settling the bankrupt's claim against Gibbons and, thus, be allowed to do that which no creditor of the bankrupt could do, and that which the bankrupt could not do? When the Trustee settled with Gibbons and acquired the note, he was simply doing what it was the duty of the bankrupt to do; that is, to acquire the note and hold White harmless in the transaction. The Trustee's statement that he “was certainly under no obligation to use estate assets to purchase or acquire the note from Gibbons” assumes that the Trustee took Herd's assets free and clear of Herd's liabilities and obligations. This assumption is contrary to the law. As is pointed out in the authorities cited by White in his opening brief on page 9, the rule is that the Trustee takes the bankrupt's property subject to the equities.

The Trustee's Argument Concerning Recoupment.

The Trustee asserts that the date of filing the petition is the date of "cleavage" in determining the right of recoupment against a trustee, so that a claim arising before bankruptcy cannot be urged where a trustee asserts a right arising after bankruptcy. No authority is cited which sustains this position. The Trustee has cited many cases on this point, but none of them deal with recoupment.

The Trustee seeks to distinguish the case of *Howard Johnson v. Tucker*, 157 F. 2d 959, cited by White, on the ground that there the trustee was seeking to enforce a right which the bankrupt held at the time of bankruptcy. First it may be noted that the court there allowed recoupment on account of claims for rent arising both before and after bankruptcy, so that certainly there can be no rule that the claim urged in recoupment must arise either before or after bankruptcy, or that the claim urged in recoupment must arise at the same time as the claim urged by the trustee. It must also be noted that there the trustee sought an accounting for the proceeds of a check which was cashed not before, but after bankruptcy, and that the claim asserted by the Trustee was one which arose after bankruptcy. The court there did not draw distinctions based on technicalities but made its decision on the equity and justice of settling all claims which arose out of the transaction upon which the trustee's claim was based.

Furthermore, as has been pointed out, the bankrupt here had a right to secure the return of the note from Gibbons which right passed to the Trustee at the time of bankruptcy.

In this connection it is interesting to note that even in case of set-off, courts of equity will not be bound by technical requirements of mutuality if equity and fair dealing requires:

“A limitation of the right of setoff to cases of mutual credits is not necessarily controlling in equity, *even though the suit is one by a trustee in bankruptcy*. A setoff is permissible, under general principles of equity, to prevent injustice, even though the debts are not strictly mutual. Trustees of a bankrupt estate, who, with knowledge of the bank as to their source, deposit funds of the estate, available for the payment of claims in a bank which holds a note against the bankrupt, may, in case the bank becomes insolvent, set off the deposit account against the claim for what remains due on the note.”

6 Am. Jur. 853, Sec. 517.

“Although as a general rule, equity, following the law, will not allow a setoff of debts accruing in different rights, it is well settled that a court of equity will take cognizance of cross claims between litigants, even though wanting in mutuality, and set off one against the other whenever it becomes necessary to effect a clear equity or prevent irremediable injustice.”

47 Am. Jur. 747, Sec. 49.

Conclusion.

The Trustee presents no compelling reason or authority for White's being forced to pay the Trustee on the note here in question, which note represented a supposed obligation of the bankrupt to a third party which the Trustee established as being non-existent.

Respectfully submitted,

FRED HOROWITZ,

ALVIN F. HOWARD,

By ALVIN F. HOWARD,

Attorneys for Joseph G. White.

No. 12862

**United States
Court of Appeals**
for the Ninth Circuit.

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. P. DUTTON AND
COMPANY, INC., a Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division**

FILED

APR 24 1951

PAUL A. O'BRIEN,

No. 12862

**United States
Court of Appeals**
for the Ninth Circuit.

HARWOOD A. WHITE,

Appellant,

vs.

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Laguna Beach, Calif.

United States District Court, Southern District of
California, Central Division

No. 11540-G

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMEL, E. P. DUTTON AND
COMPANY, INC., a Corporation, DOE I,
DOE II, DOE III, DOE COMPANY, a Cor-
poration, and ROE COMPANY, a Corporation,
Defendants.

COMPLAINT FOR DECLARATORY JUDG-
MENT IN RESPECT TO COPYRIGHT
MATERIAL

Comes now the above-named plaintiff and com-
plains of the above-named defendants and for cause
of action alleges:

I.

This action is brought and commenced to deter-
mine the rights of the plaintiff herein, under the
provisions of the Copyright Laws of the United
States (Title 17 of the United States Code) to
publish and reproduce certain literary works and
writings upon which defendants claim a copyright
and the validity of which said claimed copyright
plaintiff disputes as to a certain portion of said
works and writings.

II.

That the above-named defendants Doe I, Doe II,

Doe III, Doe Company, a corporation, and Roe Company, a corporation, are sued herein under fictitious names, the true names of said defendants being unknown to plaintiff he requests and reserves the right to insert such true names by appropriate amendment when such true names are ascertained.

III.

That the above-named defendants, E. P. Dutton and Company, Inc., a corporation, Doe Company, a corporation, and Roe Company, a corporation, are regularly and duly organized and existing corporations, that the place of organization of said corporations and the laws under which said corporations are organized are well known to defendants but are unknown to plaintiff.

IV.

That over a period of years from the early 1920's to the early 1930's one Stewart Edward White, brother of plaintiff herein, compiled, wrote and/or caused to be compiled and written a certain manuscript which the said Stewart Edward White designated and called the "Gaelic" manuscript or the "Old Gaelic" manuscript. That said manuscript purports to be the transcribed communications of "Gaelic," an individual departed this world and who existed only in the spiritual non-material world, with the said Stewart Edward White on various and divers philosophical subjects and matters.

V.

That thereafter and prior to the death of the said

Stewart Edward White in the year 1947, the said Stewart Edward White wrote a book called "The Job" or "The Job of Living" based upon the "Old Gaelic" or "Gaelic" manuscript and directly quoted extensive portions of said "Gaelic" or "Old Gaelic" manuscript. That on or about the 20th day of October, 1944, the said Stewart Edward White transferred to defendant Susan C. Kimmel all his right, title and interest in and to said manuscript called "The Job" or "The Job of Living" together with several other manuscripts including the "Old Gaelic" or "Gaelic" manuscripts.

VI.

That during the year 1948, to wit in May, 1948, and in August, 1948, defendant Susan C. Kimmel through defendant E. P. Dutton and Company, Inc., a corporation, printed, published and sold to the general public in book form said "The Job" or "The Job of Living" manuscript under the title of "The Job of Living." That said defendants caused to be printed upon said book so published, printed and sold to the general public, the following words to wit: "Copyright 1948 by Susan Kimmel." Plaintiff is informed and believes and upon such information and belief alleges that the said defendants have caused said copyright to be registered in accordance with the statute in such cases made and provided.

VII.

Plaintiff is informed and believes and upon such information and belief alleges that the said defend-

ant, E. P. Dutton and Company, Inc., a corporation, has acquired through contract with defendant Susan C. Kimmel some right or interest in said copyrighted publication "The Job of Living," the exact nature of which said contract and right is well known to said defendants but unknown to plaintiff.

VIII.

Plaintiff is informed and believes that defendants Doe I, Doe II, Doe III, Doe Company, a corporation, and Roe Company, a corporation, claim some interest or right in and to said publication, "The Job of Living" under said copyright.

IX.

That prior to the year 1944 the said Stewart Edward White had dedicated and abandoned to the general public said "Old Gaelic" or "Gaelic" manuscript by the following acts:

(1) Reproduced said manuscript himself and distributed the same without charge and without limitation as to use or right to republish to more than eighteen persons.

(2) Permitted many persons to borrow copies of said manuscript and read and loan the same.

(3) Permitted one Margaret Oettinger of Palo Alto, California, to reproduce and sell to various persons a large number of copies of said manuscript during the year 1941 and thereafter.

(4) Permitted one Mrs. Terry Duce to reproduce, distribute and sell copies of said manuscript to her friends and acquaintances.

X.

That prior to the said 20th day of October, 1941, the said Stewart Edward White presented plaintiff with a copy of said "Gaelic" or "Old Gaelic" manuscript and told and informed plaintiff he might circulate the same in any manner he chose.

XI.

That plaintiff is in the process of writing and producing a book based upon said "Old Gaelic" or "Gaelic" manuscript and has and will quote extensively therefrom. That said quotations will include some of the material quoted in said copyrighted publication called "The Job of Living." That plaintiff intends to and will publish and sell to the general public his said book.

XII.

That a dispute has arisen between plaintiff and defendants relative to the right of plaintiff to quote from said "Old Gaelic" or "Gaelic" manuscript in his, plaintiff's, said proposed book and particularly relative to plaintiff's right to quote portions of said "Old Gaelic" manuscript quoted in said copyrighted publication "The Job of Living."

That in respect to said dispute plaintiff contends that said "Old Gaelic" or "Gaelic" manuscript had, prior to any assignment thereof to defendants or any of them, been dedicated to the general public by publication without notice or claim of copyright, and that plaintiff may therefore quote from said "Gaelic" or "Old Gaelic" manuscript any portion

thereof including those portions quoted in said "The Job of Living," in his said proposed book without infringing upon said copyright claimed by defendants and without violating said defendants' rights in any manner whatsoever.

That in respect to said controversy defendants claim and contend that any quotation by plaintiff from said "Old Gaelic" or "Gaelic" manuscript would be a violation of their rights therein and particularly that the quoting of any portion of the "Old Gaelic" or "Gaelic" manuscript quoted in said "The Job of Living" by plaintiff in his said proposed publication would be and will be a violation of defendants' rights under said claim of copyright and an infringement upon said copyright. That said controversy is actual, current and bona fide.

Wherefore, plaintiff prays judgment of the above-entitled court declaring the rights of the parties relative to said controversy above set forth and determining and adjudicating that said "Gaelic" or "Old Gaelic" may be quoted and used by plaintiff without infringement upon said copyright claimed by defendants upon said book "The Job of Living." Plaintiff further prays for costs of suit incurred herein and for such further general relief as is meet in the premises.

SCHAUER, RYON &
McMAHON,

By /s/ ROBERT W. McINTYRE,
Attorneys for Plaintiff.

State of California,
County of Santa Barbara—ss.

Harwood A. White, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled and foregoing Complaint for Declaratory Judgment in Respect to Copyright Material; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

/s/ HARWOOD A. WHITE.

Subscribed and sworn to before me this 22nd day of April, 1950.

[Seal] /s/ MARTHA E. BLANCO,
Notary Public in and for the County of Santa Barbara, State of California.

[Endorsed]: Filed April 28, 1950.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
SUSAN C. KIMMELL

Comes now the defendant, Susan C. Kimmell, and answering the Complaint for Declaratory Judgment in Respect to Copyright Material on file herein for herself alone and not for any other defendant, admits, denies, and alleges as follows:

I.

Answering paragraph I of said complaint this defendant admits the allegations therein contained.

II.

Answering paragraphs II and III of said complaint this defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraphs, and therefore denies the same.

III.

Answering paragraph IV of said complaint this defendant admits the allegations therein contained.

IV.

Answering paragraph V of said complaint this defendant admits the allegations therein contained except the allegation that the death of Stewart Edward White occurred in 1947, and in this connection alleges that the said Stewart Edward White died on September 18, 1946.

V.

Answering paragraph VI of said complaint this defendant admits the allegations therein contained except the allegation that the book entitled "The Job of Living" was published in May, 1948, and August, 1948; alleges that she is informed and believes that the first publication date of said book was June 4, 1948.

VI.

Answering paragraph VII of said complaint this defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph except that, under date of September 8, 1947, she entered into a written contract of publication with E. P. Dutton and Company, Inc., covering a work then known as "The Job," by Stewart Edward White, which was later printed, published, and sold under the title "The Job of Living."

VII.

Answering paragraph VIII of said complaint this defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph, and therefore denies the same.

VIII.

Answering paragraph IX of said complaint this defendant denies that prior to the year 1944, or at any other time, Stewart Edward White dedicated or abandoned to the general public the manuscript therein designated as "Old Gaelic" or "Gaelic" or

any part thereof by the acts therein mentioned or by any other acts.

Answering sub-paragraphs (1) and (2) of said paragraph IX, this defendant denies that the distribution of said manuscript by said Stewart Edward White was without limitation as to use or right to republish by any person or persons whomsoever; and in this connection alleges that the said Stewart Edward White distributed copies of said manuscript only to persons particularly interested in the subject matter thereof, and instructed them that neither the whole nor any part of said manuscript was to be reproduced by them, nor were they to permit such reproduction by printing or by making said manuscript available to the general public in any other way.

Answering sub-paragraphs (3) and (4) of said paragraph IX, admits that Margaret Oettinger and Mrs. Terry Duce were permitted by the said Stewart Edward White to reproduce copies of said manuscript by mimeograph and to distribute the same; and in this connection alleges that the said Stewart Edward White instructed them and each of them that copies of said manuscript were to be distributed by them only to persons particularly interested in the subject matter thereof, with the understanding that they, or the persons receiving such copies from them, were not to make such copies or any parts thereof available to the general public by printing or otherwise; and further alleges that she is informed and believes that said mimeographed

copies were distributed as alleged for a charge representing only the cost of the materials used in mimeographing the same.

IX

Answering paragraph X of said complaint this defendant admits that prior to October 20, 1944, the said Stewart Edward White gave to the plaintiff herein a copy of said "Old Gaelic" or "Gaelic" manuscript; alleges that she is without knowledge or information sufficient to form a belief as to the truth of the averment that the said Stewart Edward White told or informed the plaintiff that he might circulate said manuscript in any manner he chose, and therefore denies the same.

X.

Answering paragraph XI of said complaint this defendant admits the allegations therein contained.

XI.

Answering paragraph XII of said complaint this defendant admits that a dispute has arisen as alleged; denies that, with respect to said dispute, the said manuscript of "Old Gaelic" or "Gaelic" had, prior to October 20, 1944, or at any other time, been dedicated to the general public by publication without notice and claim of copyright; alleges that such publication of said manuscript as did occur was a limited and qualified publication, not resulting in the loss or surrender by the said Stewart Edward White of his common-law right of copyright or any other rights at common law or in equity with re-

spect thereto; alleges that any quotation from said manuscript or the book entitled "The Job of Living" would be a violation of the rights of this defendant therein both at common law and under copyright, and in this connection alleges that all the rights of the said Stewart Edward White with respect to said manuscript inure to this defendant by reason of the transfer to this defendant of said manuscript by the said Stewart Edward White on October 20, 1944, as alleged in paragraph V of said complaint.

XII.

This defendant further alleges that she will be damaged unless the plaintiff be restrained and enjoined from using said manuscript "Old Gaelic" or "Gaelic" or the book entitled "The Job of Living" in any manner or from quoting the whole or any part thereof.

XIII.

This defendant further alleges that she has necessarily employed counsel in the preparation and filing of this answer, and to represent her in the above-entitled matter.

Wherefore, this defendant prays judgment as follows:

(1) That the plaintiff take nothing by his complaint;

(2) That the plaintiff be restrained and enjoined from using said manuscript of "Old Gaelic" or "Gaelic" or the book entitled "The Job of Liv-

ing'' in any manner or quoting the whole or any part thereof;

(3) That full costs of suit, including a reasonable attorney's fees be awarded to her; and

(4) That this defendant have such further general relief as is meet in the premises.

/s/ LESLIE F. KIMMELL,
Attorney for Defendant.

State of California,
County of Orange—ss.

Susan C. Kimmell, being first duly sworn, deposes and says:

That she is one of the defendants in the above-entitled and foregoing matter; that she has read the foregoing answer on behalf of herself alone and not for any other defendant and knows the contents thereof; that the same is true of her own knowledge except as to the matters which are therein stated on information or belief, and as to those matters she believes it to be true.

/s/ SUSAN C. KIMMELL.

Subscribed and sworn to before me this 23rd day of May, 1950.

[Seal] /s/ LESLIE F. KIMMELL,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 24, 1950.

In the United States District Court, Southern
District of California, Central Division

No. 11,540-Y Civil

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMELL, E. P. DUTTON & CO.,
INC., a Corporation, et al.,

Defendants.

Appearances:

For the Plaintiff:

SCHAUER, RYON & McMAHON, By
THOMAS M. MULLEN,
Santa Barbara, California.

For the Defendants:

LESLIE F. KIMMELL,
Laguna Beach, California.

OPINION

Yankwich, District Judge:

Stewart Edward White,—to whom we shall refer as “White,”—as distinguished from the plaintiff, who will be referred to as such or as “the brother,”—was a successful writer of books on ethics and philosophy of a popular nature. Prior to his death in 1947, at Burlingame, California, he published, through well-known publishers, books with the

titles: "The Unobstructed Universe," "With Folded Wings," "The Stars Are Still There," "Anchors to Windward," "The Road I Know," "Across the Unknown," "The Betty Book." After his death, E. P. Dutton & Company published, in 1948, another book entitled, "The Job of Living," with the copyright in the name of the defendant, Susan Kimmell. This book embodied some communications from the spirit world which White claimed to have received chiefly through his wife, Betty, from a personality referred to as "Gaelic." In the book (1), White identified "Gaelic" as his and his wife's

"nickname for what seemed to us a single and definite personality, apparently detailed to tell us what made the wheels go round. The material that came through Betty at that time, by and large, was inspiration, stimulus to growth and expression, with only enough explanation as to mechanics to give direction. Through 'Gaelic' our intellectual curiosities were given a certain satisfaction, on the principle that a reasonable measure of knowledge is a buttress to faith. These sessions were rare, and seemed to come only at times when one or another of a certain few people were present and in mental quandary."

The material so received was, during his lifetime, reduced to manuscript form by various reproduction processes and designated as the "Gaelic manuscript," which purported to give the communications by "Gaelic" with added comments by White.

"The Job of Living" contained portions of the manuscript.

On October 20, 1944, White executed a Bill of Sale transferring to the defendant Kimmell all his right and title to certain designated works, including the old and new "Gaelic manuscripts," "with the right to publish or otherwise use said manuscripts, in any way which she in her sole judgment shall determine."

The plaintiff, White's brother and a resident of Santa Barbara, California, in a complaint for declaratory judgment (2), seeks a declaration that both manuscripts, "Gaelic" and "Old Gaelic," are in the public domain and may be quoted without infringement either of the copyright claimed by the defendant Kimmell on "The Job of Living," or the common-law proprietary rights claimed under the Bill of Sale. This is resisted by the defendant Kimmell, who asserts that she is the owner of the manuscript and the material contained therein, whether published or unpublished. She seeks a declaration to that effect, and an injunction prohibiting the plaintiff from using any portion of the manuscript of "Old Gaelic" or "Gaelic" or "The Job of Living." The plaintiff's claim is bottomed upon the contention that, in his lifetime, and prior to the execution of the Bill of Sale in 1944, and to the publication of "The Job of Living," White allowed the unrestricted publication of the material and it is now in the public domain.

I.

The Meaning of "Publication"

The pleadings are broad enough to cover the rights to both the unpublished portions of the manuscript and "The Job of Living." The declarations sought by both parties would cover all the material, either published or not. In truth, however, what plaintiff seeks, not by reason of his relationship to White, but as a member of the public, is the right to reproduce the unpublished portion of the "Gaelic manuscript."

As the unpublished material is not copyrighted, the question of ownership must be determined by common-law principles. The common law has long recognized a property right in the products of man's creative mind, regardless of the form in which they took expression. For this reason, literary compositions and philosophical speculations, whether they are presented as the original work of the author or are claimed to have been transmitted to him through one of the many forms of inspiration that have come to be recognized as the source of intellectual production, are treated as a kind of property. (3) And the author has property in his manuscript which will be protected by the courts against anyone who seeks to deprive him of it, either by securing an unauthorized copy of it or by publishing it. The right exists until the author permits a general publication. (4) The following language of the Supreme Court is a pithy summary of the principles just adverted to:

“At common-law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner’s common-law right was lost. At common law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority.” (5) (Emphasis added.)

What constitutes general publication has given the courts much concern. The Supreme Court has adopted as its own the following criterion for determining the matter:

“It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property.” (6)

The publication, to be effective as a dedication, must be a general publication. A limited publication which communicates the contents of a manuscript to a definite group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a “limited publication,” which does not result in loss of the author’s common-law right to his manuscript. (7)

An early American case contains a very clear statement of the conditions which render a publication limited in nature:

“The distinction between a public circulation of written copies, and a restricted or private

communication of their contents, was, for some purposes, recognized before the use of printing.

* * * But, except under special and unusual circumstances, an author who then parted with a manuscript copy gave to it the most public circulation of which it was capable. Now, the parting by an author with manuscript copies of his unprinted composition is ordinarily regarded as an act of mere private circulation. * * *

Printed copies also may be circulated privately. Their circulation is thus private when they are delivered to a few ascertained persons only, who receive them under conditions expressly or impliedly precluding any ulterior diffusion of the knowledge of their contents. Such a case occurs when a small first edition of a book, printed with a notice on the title page that it is for private circulation, is gratuitously distributed by the author among particular persons. Mr. Justice Talfourd, when at the bar, issued in this manner the first impressions of his tragedy of *Ion*. Here the restrictions were expressly defined. It may, in other cases, be implied from the selection of the persons, and from the method or attendant circumstances of the delivery. * * * The circulation must be restricted both as to persons and purpose, or it cannot be called private." (8) (Emphasis added.)

One of the older authorities on the law of property in intellectual productions has summed up the

rights of the author of an unpublished book in this manner: (9)

“He has a right to exclude all persons from its enjoyment; and, when he chooses to do so, any use of the property without his consent is a violation of his rights. He may admit one or more persons to its use, to the exclusion of all others; and, in doing so, he may restrict the uses which shall be made of it. He may give a copy of his manuscript to another person, without parting with his literary property in it. He may circulate copies among his friends, for their own personal enjoyment, without giving them or others the right to publish such copies.”
(Emphasis added.)

From this, it is evident that, in determining whether a publication is general or special, the test is

“whether it is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject matter by the public or the members thereof to whom it is communicated.” (10)

The case from which the foregoing quotation is taken epitomizes the law in this manner:

“A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public. Prior to such publication, a person

entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals or a limited, ascertained class, or he may expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose. A publication under such restrictions is a limited publication, and no rights inconsistent with or adverse to such restrictions are surrendered. Restrictions imposed upon the use prior to publication protect the copyright. Such restrictions imposed after publication cannot affect the public rights acquired by reason of the fact of publication. The nature of the subject-matter, the character of the communication, circulation, or exhibition, and the nature of the rights secured, are chiefly determinative of the question of publication." (11)
(Emphasis added)

Implicit in these rulings is the thought that if the circumstances show an intent to communicate the contents of the manuscript to a designated group and for a specified purpose, and does not extend to the public, at large, the publication is limited. For this reason, the private circulation of an original manuscript or copies of it

"is not a publication unless it amounts to a general offer to the public." (12)

Limited publication, as defined by these authorities, is, in its effect, no more than the exhibition of a painting, the representation of a play, or the giving of a lecture,—none of which destroys the right

of common-law ownership or confers the right to unrestricted reproduction or circulation.

II.

Limited Publication

Tested by the principles just referred to, the evidence in this case shows no intention to dedicate any portion of the "Gaelic" manuscripts to the public. And this conclusion may be drawn from the evidence on behalf of the plaintiff, which consisted of his own testimony, that of White's former secretary, W. N. Maguire, and the depositions of Margaret Oettinger and Harriet W. Jones.

The plaintiff and the former secretary testified generally that in 1933 and 1934, copies of the manuscript made by what was referred to as the "ditto process," were sent out from White's office to certain persons interested in the ideas which White had believed in, and which he had made popular through his books. But they admitted that the persons to whom the copies were sent were persons whose names had been sent in by friends or as persons interested in the ideas or belonging to the small elite who were studying them. No copy was ever placed in a public library, a reading room or on the shelf of a book store or club, where it was made accessible to anyone who wished to look at it. Nor were any copies offered for sale. Mrs. Oettinger was permitted to make a copy for herself, and she stated, in her deposition, that in 1941, she distributed some thirty copies. But it was evident from her own testimony that in her discussion with

White, she had referred to the fact that she wished to make copies "for two or three people." Whereupon, he suggested that he knew other people who might want them, and so he authorized her to make the copies. As she was not a woman of means, he authorized her to charge such persons as were referred to her two dollars for the cost of mimeographing. Her testimony in this respect is very revealing:

"Q. And was there any statements at that time made with respect to where you would sell or distribute the manuscripts which you made, or the copies which you made?

"A. No. I hadn't had very much experience with it at that time, and I knew of two or three people who wanted copies and that is all I knew about it, that two or three people wanted copies, and he said he knew several people who would like to have copies, and he gave me from time to time the names of people who would like to have copies of this manuscript. Several of the copies I disposed of were sent to people whose names were given to me by Mr. White.

"Q. Did you have a copy of the manuscript before you went to see Mr. White?

"A. Yes. I had borrowed a copy from Mrs.—Dr. Benner, I can't think of her name was—Katherine Benner.

"Q. Did she have several copies?

"A. I think she only had one. She might

have—I don't know whether she had more than one or not." (13)

While the witness sought to give the impression that she was given *carte blanche* to reproduce and distribute at will, the excerpt just quoted shows strictly the limitations which were imposed. Her own testimony and the testimony of others show that any of the names sent to her were selected by others, including the defendant. Mrs. Harriet White's deposition stated that White had told her that he had given Mrs. Oettinger permission to "pass out" the material and that she secured two or three copies for two dollars each. Despite the attempt of this witness to prove permission "to sell," the pattern which emerges is that of a selected group of persons recommended either by White or the others who were interested in the philosophical or ethical principles that he was preaching, who were given access to the manuscript. These are distinguishing marks of private distribution.

III.

The "Gaelic" Manuscripts Are Not in Public Domain

The New York Court of Appeals, in a case which has already been cited, while holding that the facts in the particular case showed a general publication, laid down the indicia of private distribution, in language which is very appropriate to the discussion here:

"* * * If a book be offered gratuitously to

the general public, it will constitute publication. This may be done by presenting it to public libraries, and this is so because the author or publisher, by that act, puts it in such a place that all the public may see it if they choose. The reason why exposing for sale or offering gratuitously to the general public constitutes publication is stated in the last part of the rule as follows: 'So that any person may have an opportunity of enjoying that for which copyright is intended to be secured.' * * *

Several cases have arisen where the courts have held that the private circulation of pictures, manuscripts, or printed books did not constitute a publication, such as *Prince Albert v. Strange*, *supra*; also *Bartlette v. Crittenden*, 4 McLean, 300 Fed. Case No. 1,082, where the plaintiff, a teacher of bookkeeping, for the convenience of his pupils, wrote his system of instructions on separate cards, which they were permitted to keep for their convenience. So a gratuitous circulation of copies of a work among friends and acquaintances has been held not to amount to a publication. *Dr. Paley's Case*, cited in 2 Ves. & B. 23, was one where a bookseller was restrained from publishing manuscripts left by Dr. Paley for the use of his own parishioners only. Coppinger, in his work on Copyright, at page 117, after considering the last case cited and others, reached the following conclusion: 'The distinction is in the limit of the circulation. If limited to friends

and acquaintances, it would not be a publication; but, if general, and not so limited, it would be.” (14) Emphasis added.)

And the limitation which makes the publication private does not relate to numbers of persons, but to the type of persons and the purpose of communication. If limited to friends or acquaintances, or persons having a common interest in a publication, or in the ideas which it expresses, the limitation is effective, although, in reality, a large number of copies may be circulated. In a New York case, involving the question whether the distribution of reprints of a copyrighted article without an indication of the copyright was a waiver of the copyright, it appeared that thousands of reprints were distributed to the author's patients with instructions to call the article to the attention of others. Reprints were kept in the author's reception room where they could be examined or carried away by persons visiting the establishment. Nevertheless, the Court held that the copyright was not thereby lost, saying:

“The primary purpose of the distribution was to give information to persons interested in the subject discussed by the articles, and to relieve Schellberg of the necessity of orally explaining his system of treatment to those who might wish to learn about it.” (15)

So, here, the inference can be drawn, even from the testimony on behalf of the plaintiff, that the object of distribution was not to dedicate the contents of the “Gaelic” manuscript to the public, but

to communicate to a few persons interested in the subject,—kindred spirits, as it were, the philosophy it taught. Indeed, the testimony showed that the manuscript originated in part, from written answers which had been given to questions propounded by readers of White's other books. We clearly have a person who promulgates a certain philosophy and makes it possible for some of those interested in it to see its exposition, by permitting them to have for their own use a privately mimeographed copy of an unpublished manuscript. The manuscript is, therefore, the equivalent of the notes which a student makes of a lecture. The lecturer, by permitting him to make the notes and take them away, does not lose his right to later copyright the material.

From the very beginning of the development of this branch of the law, it has been conceded that circulation among students does not destroy the common-law right of the author, in one of the old cases, (16) the Lord Chancellor made the following observations:

“Now, if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him, and it is his duty to do that; but I have never yet heard that anybody could publish his lectures; nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years, if there had been such a right as that; but it never was understood that those lectures could be published;—and so with re-

spect to any other lectures in the university, it was the duty of certain persons to give those lectures; but it never was understood that the lectures were capable of being published by any of the persons who heard them.”

And all those who have followed Blackstone and combined teaching with writing, whether in the field of law or others, have had the benefit of the rule. (17)

We add that other evidence in the record supports the conclusion that there was no general publication. As the plaintiff leans heavily on the deposition of Mrs. Oettinger, it is very significant that on the copy of the manuscript which she produced with the deposition, there was the printed legend “Reproduced by permission of Steward Edward White.” Such an inscription contradicts the design to publish to the world at large. For if the object be to release the material to the public, the statement of permissive reproduction is meaningless. Its appearance on the manuscript indicates the limited purpose of the permission granted. White, in reporting on November 18, 1940, to the defendant his understanding with Mrs. Oettinger, wrote:

“Just a hasty note, before you do any work copying Gaelic. Yesterday afternoon some people were here from Palo Alto who are so stuck on Gaelic that they want to copy it in mimeograph. They asked (a) whether I was willing; (b) if so, would I mind their pass—it around

among such of their friends who want copies, (c) if so, again, whether I would mind their charging such people the exact cost. I approved. So, if you write them, you might get one of those copies. Name: Mrs. Frank Oettinger, RFD #1, Menlo Park, Cal.” (18)

This is a contemporaneous statement, and is very persuasive as to what the understanding was. In a letter dated May 18, 1945, to Mrs. Oettinger, he indicates that the right to copy did not imply the right to publish in general:

“As to the Gaelic, Sue Kimmell is quite right in saying that you may go ahead at your discretion with more copies of it. And your friend, Barbara Kelkin, got the wrong impression. I have no objection whatever to the distribution of copies of Gaelic, provided, of course, it is not in published form.” (19)

White had published many books in his lifetime. So, when he spoke of reserving “publication” rights, as he did in the Bill of Sale and in this letter, he used the words in the sense in which they are used in the law of literary property, with which he was familiar. Otherwise put, he was determined that the permission granted did not result in a general publication.

And, in a letter written on October 26, 1944, to the defendant a few days after the Bill of Sale was executed, White spoke about his brother’s possible attempts to assert rights to the “Gaelic Manu-

script," and gave that as his reason for protecting her against

"what might be a disagreeable situation. The sort of squabble that just might arise if, after I die, he should rise and howl and attempt to do his own Gaelic, and show active resentment about an 'outsider' having the say over him, etc., etc., you can imagine as well as I." (20)

The deposition of Ivy Oneita Duce, relating to her conversation with White, offers positive proof of the fact that strict limitations were imposed upon all persons who were given the right to copy the "Gaelic" manuscript, (21) as does also the deposition of Don E. Stevens.

These occurrences, ranging over a period of years, are not, as the brother contends, mere self-serving declarations which seek to explain after the act, what was done; they are a consistent series of statements showing a clear design on White's part to limit communication. It is true that, notwithstanding such design, it was still possible for those to whom permission was given to destroy the effect of limitations by unlimited general distribution. (22) But this, fortunately, did not occur. Even those who would now generalize the limited right they received, testify to the observance of the limitation. The most conservative estimate of the number of copies distributed does not exceed 75. And, as already appears, this distribution was to designated persons. None was made to a public institution where the public had access to it. None was sold. And the case before us comes clearly

within the rule stated in *Bartlette v. Crittenden* (23):

“To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it, than it would be a transfer or abandonment of an exclusive right to republish, to give the copy of a printed work. In his treatise on Equity, (Section 943) Mr. Justice Story says, ‘In cases of literary, scientific, and professional treatises in manuscript, it is obvious that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication, to which the receiver may choose to devote them.’ And he says, to prevent the publication of manuscripts, without the consent of the author, an injunction should be issued.”

The conclusion is therefore inescapable that there was no general publication of the “Gaelic” manuscript.

The consistency with which the courts for over a century and a half have upheld an author’s common-law right to his manuscript and the ardor

which they have shown to protect his rights, despite limited publication, is one more indication of the healthfulness of the common-law system and the determination of the courts to use their powers, aided by equitable principles, to protect intellectual products against piracy. No reason exists why we should depart from these strict standards. In these days of quick communication of ideas, a rule which would make a limited disclosure, such as occurred in this case, synonymous with publication would deny to the creator in the intellectual field the right to the product of his creative imagination. This would be harmful to the development of ideas. For, if we encourage piracy, we discourage creative minds from sharing, in a restricted manner, their ideas before their full fruition. The policy of the law, in protecting intellectual products, is to encourage productivity. (24) A protected limited sharing may enhance it by giving additional time for a fuller development. A weakening of this right might result either in premature publication or a total withholding of ideas, under fear of injury to the author's ownership in them. Either would be a loss to the creative spirit, which the courts should not consciously encourage.

Judgment and declaration will, therefore, be for the defendant that the "Gaelic" manuscripts are not in the public domain, and that the defendant is their sole owner.

Injunction will issue enjoining the plaintiff from using it in any manner.

Costs, but not attorney's fees, will be allowed the defendant.

Dated this 6th day of December, 1950.

/s/ LEON R. YANKWICH,
Judge.

NOTES TO TEXT

1. Stewart Edward White, *The Job of Living*, 1948, p. 22.

2. 18 U.S.C., Secs. 2201-2202.

3. 18 C.J.S., Copyright and Literary Property, Secs. 4-10; Amdur, *Copyright Law and Practice*, 1936, pp. 30-31; California Code of Civil Procedure, Sec. 980. And see: *Wheaton v. Peters*, 1834, 8 Pet. 591, 657-658; *Bobbs-Merrill Co. v. Straus*, 1908, 210 U. S. 339, 346; *Moore v. Ford Motor Co.*, 2 Cir., 1930, 43 F(2) 685, 686; *Echevarria v. Warner Bros. Pictures, Inc.*, 1936, D. C. Cal., 12 F. Supp. 632, 634; *Supreme Records, Inc. v. Decca Records*, 1950, 90 F. Supp. 904, 906; *Loew's Inc. v. Superior Court*, 1941, 18 C(2) 419, 421; *Yadkoe v. Fields*, 1944, 66 C.A. (2) 150, 160; *Johnston v. Twentieth Century Film Corporation*, 1947, 82 C.A. (2) 796, 807-808.

Our Court of Appeals has summed up the principle in one brief sentence:

"Literary property is not distinguished from other property and is subject to the same rules and is likewise protected." (Emphasis added.) *Universal Pictures v. Harold Lloyd Corp.*, 1947, C.A. 9, 162 F(2) 354.

4. *Bartlette v. Crittenden*, C.C. Ohio, 1849, Fed. Cas. No. 1076, 2 Fed. Cas. p. 967; *Press Publishing Co. v. Monroe*, 1896, C.A. 2, 72 Fed. 196, 199; *Caliga v. Inter-Ocean Newspaper*, 1909, 215 U. S. 182, 188; *Moore v. Ford Motor Co.*, *supra*, p. 686; *Nutt v. National Institute, etc.*, 1929, C.A. 2, 31 F(2) 236, 238.

5. *Caliga v. Inter-Ocean Newspaper*, 1909, 215 U. S. 182, 188.

6. *American Tobacco Co. v. Werckmeister*, 1907, 207 U. S. 284, 299-300, quoting, with approval, Slater on the Law of Copyright and Trademark, p. 92.

7. *Abernethy v. Hutchinson*, 1824, 3 L.J. Ch. Reports 209; *Prince Albert v. Strange*, 1849, 2 De Gex & S.M., 652, 41 Eng. Rep. (Reprint) 1171; *Prince Albert v. Strange*, 1849, 1 Mc. & G. 25, 64 Eng. Rep. (Reprint) 293; *Werckmeister v. American Lithographic Co.*, 1904, 2 Cir., 134 Fed. 321, 325 *Jewelers' Mercantile Agency v Jewelers' Weekly Publishing Co.*, 1898, 155 N. Y. 241; 49 N.E. 872; *Kurfiss v. Cowherd*, 1938, 233 Mo. App. 347, 121 S.W(2) 282; *Waring v. WDAS Broadcasting Co.*, 1937, 327 Pa. St. 433, 194 Atl. 631; *Berry v. Hoffman*, 1937, 125 Pa. Sup. 261, 180 Atl. 516.

8. *Keene v. Wheatley*, C.C. Pa., Fed. Cas. No. 7644, 14 Fed. Cas. 180, 191.

9. Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Products*, 1879, pp. 102-104.

This test has been repeatedly cited with approval by the courts. And see, *Bobbs-Merrill Co. v. Straus*, *supra*, p. 18; *Werckmeister v. American Lith. Co.*, *supra*, p. 324.

10. *Werckmeister v. American Lith. Co.*, *supra*, p. 325.

11. *Werckmeister v. American Lith. Co.*, *supra*, p. 326.

12. *Werckmeister v. American Lith. Co.*, *supra*, p. 325.

13. Deposition of Margaret Oettinger, Plaintiff's Exhibit No. 4, pp. 5, 6.

14. *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, *supra*, p. 875.

15. *Schellburg v. Empringham*, 1929, D.C. N.Y., 36 F(2) 991, 992.

16. *Abernethy v. Hutchinson*, *supra*, p. 215. And see, *Nutt v. National Institute, etc.*, 1929, C.A. 2, 31 F(2) 236, 238.

17. *Nutt v. National Institute, etc.*, 1929, C.A. 2, 31 F(2) 236; *Waring v. WDAS Broadcasting Co.*, 1937, 327 Pa. 433, 194 Atl. 631.

18. Defendant's Exhibit A.

19. Plaintiff's Exhibit 3.

20. Defendant's Exhibit C.

21. Defendant's Exhibit D, Deposition of Ivy Oneita Duce, from which we quote:

“Q. Now, did Mr. White ever give you permission to make copies of that manuscript?

“A. Well, I just started explaining to you what happened. He told me I could write to this Mrs. Oettinger and get a copy from her, and I wrote to her and she informed me that she had no more copies but that she had some stencils and that they were very badly worn but that if I wished to I could make some copies from these stencils. So then, as I remember it, I wrote to Mr. White and asked him about it, and he said to me that it was perfectly all right for me to make a few copies but they were to be limited and that I was only to allow a few of my close friends to see them, that I must be very careful, in fact, to whom I showed them, because since they had not been published anybody could, you might say, steal the material; and naturally I wanted to protect his manuscript from anything like that. So I had these two or three friends here who were studying like I was, and we sent up to the lady and she sent us the stencils. And I had no mimeograph machine, and a Mrs. Cuthbert had a mimeograph machine and she turned out, as well as I can remember, about ten copies. I know she had to remake or recut some of the stencils, they made such bad copies. * * *

“Q. And what happened to them?

“A. And I still have three of them. And, as I said, I have not referred to them for years, because I, myself, went into the study of mysticism, which goes far beyond occult phenomena,

and I have just very occasionally read a few paragraphs of it to some of my students who might be puzzled about something. I have three copies, as well as I know, on my shelf, and Don Stevens received one and we sent one to Mr. Stewart White because he said he was out of copies at the moment. He had loaned his out and didn't have any at the moment. And I believe Mrs. Cuthbert got one and Mrs. Ahlstrand and Mrs. Simpson got one, and I think we sent one to Mrs. Oettinger. * * *

"Q. Now, those people who received copies were known to Mr. White, were they not? * * *

"A. He knew who they were.

"Q. He knew who they were, and you had his permission to give them a copy?

"A. Oh, yes.

"Q. In other words, it was not left to you to distribute to——

"A. Oh, no, because he had adjured me to be very careful as to who saw it, because he didn't want this material to fall into the hands of unprincipled people.

"Q. In other words, I take it that you were given very definite instructions that no one except selected groups or individuals could peruse that matter or even see it?

"A. Very definitely." (pp. 8-11..) (Emphasis added.)

22. Cf. *Kurfiss v. Cowherd*, 1938, 233 Mo. App. 397, 121 S.W.(2) 282, 287-288; *Larrowe-Loisette v. O'Laughlin*, 1898, C.C. N.Y., 88 Fed. 896.

23 *Bartlette v. Crittenden*, 1849, C.C. Ohio, Fed. Cas. No. 1076, 2 Fed. Cas. 967.

24. The American law of copyright stems from the power conferred upon the Congress by the Constitution "to promote the progress of science and useful arts." (Constitution of the United States, Article I, Sec. 8.) And, as cases discussed in this Opinion indicate, the common-law right to literary property precedes the constitutionally authorized protection and was not in any way affected by the enactment of the copyright laws, except that one availing himself of the copyright laws loses the corresponding common-law rights. See *Bobbs-Merrill Co. v. Straus*, 1908, 210 U. S. 339, 346-349; *Loew's Inc. v. Superior Court*, 1941, 18 C(2) 419, 421-425.

[Endorsed]: Filed December 6, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 29th day of November, 1950, in the court-room of the Honorable Leon R. Yankwich, Judge Presiding, Schauer, Ryon and McMahon, by Thomas M. Mullen, appearing as counsel for the Plaintiff, Harwood A. White, and Leslie F. Kimmell appearing as counsel for the Defendant, Susan C. Kimmell, and the Court having heard the testimony and having examined proofs offered by the respective parties, and the

cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its findings of fact as follows:

Findings of Fact

I.

That each and all of the allegations and denials set forth in the answer of the Defendant, Susan C. Kimmell, to the complaint of the Plaintiff are true.

II.

That Stewart Edward White, during his lifetime, put into written form certain communications from a personality in the nonmaterial or spirit world who was referred to as "Gaelic"; that the said Stewart Edward White called said written form of the communications the "Old Gaelic" manuscript; that subsequently the said Stewart Edward White embodied a portion of the "Old Gaelic" manuscript, together with his own comments and explanations, in a second manuscript which he called the "New Gaelic" manuscript, or "The Job" manuscript.

III.

That the said Stewart Edward White transferred to Defendant, Susan Kimmell, all of his right, title and interest in the "old Gaelic" manuscript and the "New Gaelic," or "The Job" manuscript by a bill of sale, dated October 20, 1944.

IV.

That in 1948, subsequent to the death of the said Stewart Edward White, the "New Gaelic" or "The

Job” manuscript was published in book form by E. P. Dutton & Co., Inc., under the title “*The Job of Living*”; that the statutory copyright to said book was taken in the name of Susan Kimmell, the Defendant herein; and that said book was offered for sale to the general public.

V.

That during the lifetime of the said Stewart Edward White he made copies of the “*Old Gaelic*” manuscript by the “*Ditto*” process and distributed said copies to persons particularly interested in his teachings and philosophy and in the subject-matter of said manuscript, but not to the general public without discrimination as to persons; that subsequent thereto, and during the lifetime of the said Stewart Edward White, Margaret Oettinger and Ivy Oneita Duce, also known as Mrs. Terry Duce, with the permission of the said Stewart Edward White, made additional copies of said “*Old Gaelic*” manuscript by the mimeograph process and distributed said copies to friends and persons particularly interested in the teachings of the said Stewart Edward White and in the subject-matter of said manuscript, but not to the general public without discrimination as to persons; that said permission was given to the said Margaret Oettinger and the said Ivy Oneita Duce to reproduce and distribute said copies on the condition that the whole or any part of the contents thereof be not published and distributed to the general public; that the said Margaret Oettinger and the said Ivy Oneita Duce, with the permission

of the said Stewart Edward White, collected from the persons to whom said copies were delivered proportionate amounts not to exceed the actual cost of materials used in the mimeographing thereof; that the total number of copies of said manuscript produced and distributed by the said Stewart Edward White, the said Margaret Oettinger, and the said Ivy Oneita Duce did not exceed 75 copies.

VI.

That copies of said "Old Gaelic" manuscript were not at any time or at any place made available to the general public without discrimination as to persons by being placed in a public library, in a reading-room, in a commercial lending-library, or in a retail book-store, or by being otherwise offered for sale.

VII.

That the allegation set forth in sub-paragraph (1) of paragraph IX of the complaint of the Plaintiff that the said Stewart Edward White distributed said "Old Gaelic" or "Gaelic" manuscript to more than 18 persons without limitation as to the use or right to republish is not true and does not constitute a dedication of said manuscript to the general public; that the allegation set forth in sub-paragraph (2) of said paragraph IX that the said Stewart Edward White permitted many persons to borrow copies of said manuscript and to read and loan the same is not true in so far as the words "many persons" imply the general public, and does not constitute a dedication and abandonment of

said manuscript to the general public; that the allegation set forth in sub-paragraph (3) of said paragraph IX that the said Stewart Edward White permitted the said Margaret Oettinger to sell to various persons a large number of copies of said manuscript during the year 1941 and thereafter is not true and does not constitute a dedication and abandonment of said manuscript to the general public; and that the allegation set forth in sub-paragraph (4) of said paragraph IX that the said Stewart Edward White permitted the said Mrs. Terry Duce to sell copies of said manuscript to her friends and acquaintances is not true and does not constitute a dedication and abandonment of said manuscript to the general public.

VIII.

That the allegation in said paragraph X of the Plaintiff's complaint that the said Stewart Edward White told and informed the Plaintiff that he might circulate the "Old Gaelic" manuscript in any way he chose is not true.

IX.

That the Plaintiff is in the process of writing a book based upon said "Old Gaelic" manuscript which he intends to publish and sell to the general public; that he threatens to quote extensively from said "Old Gaelic" manuscript and also to quote from said book "The Job of Living" in writing such book.

X.

That an actual, current, and bona fide controversy

has arisen between the Plaintiff and the Defendant relating to the right of the Plaintiff to quote from said "Old Gaelic" manuscript and from said book "The Job of Living."

From the foregoing facts the Court concludes:

Conclusions of Law

I.

That the distribution of said "Old Gaelic" manuscript by the said Stewart Edward White, the said Margaret Oettinger, and the said Ivy Oneita Duce was a limited, qualified, and private publication, and was not a general publication.

II.

That the Defendant, Susan C. Kimmell, is entitled to judgment and declaration that the said "Old Gaelic" manuscript is not in the public domain and said "New Gaelic" or "The Job" manuscript was not in the public domain when the book "The Job of Living" was published and copyrighted in 1948.

III.

That the Defendant, Susan C. Kimmell, is entitled to judgment and declaration that she is the sole owner of said "Old Gaelic" manuscript, and was the sole owner of said "New Gaelic" or "The Job" manuscript when said book "The Job of Living" was published in 1948, and is now the sole owner thereof.

IV.

That the Defendant, Susan C. Kimmell, is entitled

to an injunction perpetually enjoining and restraining the Plaintiff, Harwood A. White, from using said "Old Gaelic" manuscript, said "New Gaelic" or "The Job" manuscript, and said book "The Job of Living" in any manner and from quoting the whole or any part of said manuscripts and said book.

V.

That the Defendant, Susan C. Kimmell, is entitled to judgment for her costs and disbursements incurred and expended herewith.

Let judgment and declaration be entered accordingly.

Dated this 27th day of December, 1950.

/s/ LEON R. YANKWICH,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 27, 1950.

United States District Court, Southern District of
California, Central Division

No. 11540-Y

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMELL, E. P. DUTTON AND
COMPANY, INC., a Corporation; DOE I,
DOE II, DOE III, DOE COMPANY, a Cor-
poration, and ROE COMPANY, a Corporation,
Defendants.

JUDGMENT AND DECLARATION THAT
CERTAIN MANUSCRIPTS ARE NOT IN
THE PUBLIC DOMAIN, THAT THE DE-
FENDANT, SUSAN C. KIMMELL, IS THE
SOLE OWNER THEREOF, AND RE-
STRAINING THE PLAINTIFF FROM
USING AND QUOTING FROM SAID
MANUSCRIPTS AND A CERTAIN BOOK
COPYRIGHTED BY SAID DEFENDANT

This cause came on regularly for trial on the 29th
day of November, 1950, in the court room of the
Honorable Leon R. Yankwich, Judge Presiding;
Schauer, Ryon & McMahon, by Thomas M. Mullen,
appearing as counsel for the Plaintiff, Harwood A.
White, and Leslie F. Kimmell, appearing as counsel
for the Defendant, Susan C. Kimmell, and the
Court having heard testimony and having examined
the proofs offered by the respective parties, and

the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now therefore by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged, Decreed, and Declared as follows:

1. That that certain manuscript, compiled and written by Stewart Edward White, called, referred to and designated as the "Old Gaelic" manuscript is not in the public domain.

2. That that certain manuscript, compiled and written by Stewart Edward White, called, referred to and designated as the "New Gaelic" or "The Job" manuscript was not in the public domain the same was published in book form in the year 1948 under the title "The Job of Living."

3. That the Defendant, Susan C. Kimmell, since October 20, 1944, has been and is now the sole owner of said "Old Gaelic" manuscript and said "New Gaelic" or "The Job" manuscript, and that said Defendant owns the copyright to said book "The Job of Living."

4. That the Plaintiff, Harwood A. White, his agents, servants, and employees be and they and each of them are hereby perpetually enjoined and restrained from using the whole or any part of said "Old Gaelic" manuscript, said "New Gaelic" or "The Job" manuscript, and said book "The Job of Living" in any manner, and from quoting the

whole or any part of said manuscripts and said book.

5. That the Defendant, Susan C. Kimmell, have and recover from the Plaintiff, Harwood A. White, her costs and disbursements incurred herein, taxed at \$58.20.

Dated this 27th day of December, 1950.

/s/ LEON R. YANKWICH,
District Judge.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 27, 1950.

Judgment entered December 27, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiff, Harwood A. White, hereby appeals to the United States Court of Appeals for the Ninth Circuit Court from the final Judgment made and entered in this action on the 27th day of December, 1950, in Judgment Book Number 70 at page 8 thereof, and from the whole of said Judgment.

Dated: This 22nd day of January, 1951.

SCHAUER, RYON
& McMAHON,

/s/ THOMAS M. MULLEN,

/s/ ROBERT W. McINTYRE,
Attorneys for Plaintiff
Harwood A. White.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 24, 1951.

In the United States District Court, Southern District of California, Central Division

No. 11540-Y-Civil

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMELL, E. P. DUTTON AND COMPANY, INC., a Corporation; DOE I, DOE II, DOE III, DOE COMPANY, a Corporation, and ROE COMPANY, a Corporation,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

November 29, 1950

Appearances:

For the Plaintiff:

SCHAUER, RYON & McMAHON, By,

THOMAS M. MULLEN, Esq.,

26 East Carrillo Street,

Santa Barbara, California.

For the Defendant, Susan C. Kimmell:

LESLIE F. KIMMELL, Esq.,

215-D Ocean Avenue,

Laguna Beach, California.

Wednesday, November 29, 1950. 10:00 A.M.

The Clerk: No. 11540-Y, Harwood A. White v. Susan C. Kimmell, et al.

Mr. Mullen: Ready for the plaintiff.

Mr. Kimmell: Ready for the defendant Susan C. Kimmell.

The Court: All right, gentlemen. Let me ask, who is appearing for the plaintiff?

Mr. Mullen: Thomas M. Mullen, your Honor.

The Court: Let me ask you one question, before you make an opening statement, Mr. Mullen. You are not claiming an actual violation of the copyright, but you claim sort of a threatened violation, or has the situation changed since the complaint was written?

I may say, frankly, that while I am very familiar with the law of copyright, as you no doubt are aware, by the number of opinions I have written, both as a judge of this court and as a judge of the Superior Court, this is the first time that a declaratory judgment has arisen with regard to copyright material. I want to make certain whether we are deciding a question in advance of an alleged appropriation, or what.

Ordinarily, the violation of a copyright, unless a right of ownership is involved as between certain persons—and I have had actions of that character—unless we are dealing with who owns a copyright, under the federal statute no right [2] of action, either under the common-law right of literary property or under the federal copyright laws, is actually

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

violated until there has been an actual appropriation and use of the material.

Mr. Mullen: With your Honor's permission and perhaps at the expense of a few surplus words here, I think I can probably summarize very briefly for your Honor what we understand——

The Court: The only thing, I have allotted two days for this case, and I want to warn you that it must be finished by tomorrow evening because I am due to hold court in Fresno Friday morning.

Mr. Mullen: I think, your Honor, that we probably will be able to complete well within the time limit.

We are asking for this declaratory judgment, your Honor, upon the following theory: In this case there is really a single clear-cut issue presented. The issue is whether or not a certain manuscript, literary property, was the subject of a general publication or a limited publication by the author.

That becomes of importance in this manner: that certain portions of the material in a manuscript known as "The Gaelic Manuscript" or "Old Gaelic Manuscript" have been incorporated in a book entitled "The Job of Living," which has been copyrighted and published by the defendant in this action.

The plaintiff in this action happens to be the brother of the original author of "The Gaelic Manuscript." [3]

The Court: That is Stewart Edward White, who wrote historical novels?

Mr. Mullen: That is correct. "The Gaelic Manuscript," your Honor, is a compilation of communications received by Stewart Edward White purportedly from an invisible person in the spirit world.

As these various conversations took place, they were recorded day by day or week by week, as they occurred, and accumulated chronologically.

After some 15 years or thereabouts, we think the evidence will show, Stewart Edward White compiled from the chronological accumulation of these spiritual communications this manuscript called "The Job of Living."

It is our position that, after compiling that manuscript, Stewart Edward White freely distributed this manuscript to all persons who manifested an interest in the same. That he permitted several persons to make mimeographed copies of the same and to sell those to any person who applied to him for copies for reading or for purchase.

We contend that, by that action, in himself distributing this "Gaelic Manuscript" and in permitting others to reproduce it and distribute it for sale, he released his common-law copyright privilege in the manuscript. Therefore, at a subsequent date, when he himself quoted in his book, "The Job of Living," from "The Gaelic Manuscript," the book "The Job of [4] Living" quotes from the "Old Gaelic Manuscript," not entirely but in portions.

That copyright on "The Job of Living" was assigned in the year 1944 to the defendant Susan Kimmell, the defendant in this action. Susan Kim-

mell owns, I believe, the copyright to "The Job of Living," and the present issue presented, your Honor, is that Harwood A. White, one of the persons who, prior to the copyrighting of "The Job of Living," was given a copyright of the manuscript, "The Gaelic Manuscript," and told he might do with it what he wished. He now wishes to write a book based upon the "Old Gaelic Manuscript." He has been informed, I believe, by the defendant Susan Kimmell that any attempt on his part to quote from the portions of the "Old Gaelic Manuscript" which appear in the copyrighted book "The Job of Living" would constitute and be an infringement of her copyright privileges.

The Court: As you know, under copyright law, manuscripts may, under certain limited conditions, be copyrighted material.

Mr. Mullen: That is correct, your Honor.

The Court: In fact, I have done it myself. I have copyrighted lectures, when I was on the Extension Division, when I talked all over the State of California. For instance, I copyrighted a lecture I used to give on the defenses on the law of libel, and afterwards I was able to incorporate it in my first book on libel, and then in my second book, which [5] I published this year.

Does the defendant assert here a copyright of the manuscript?

Mr. Mullen: No, your Honor.

The Court: Or priority rights in the manuscript, by reason of transfer of them, or what?

Mr. Mullen: I think the position of the defendant——

The Court: I will have them state it.

Mr. Mullen: It is my understanding of the position of the defendant that they claim a copyright interest only in the portions of "Gaelic Manuscript" which have been quoted in the book "The Job of Living."

Mr. Kimmell: May I interpolate, your Honor?

The Court: Yes.

Mr. Kimmell: And also common-law rights in the unpublished portions of "The Gaelic Manuscript" which do not appear in the book entitled "The Job of Living."

The Court: Just a minute. Let us find out who appears in this case.

Mr. Mullen: At this time, your Honor, plaintiff will move to dismiss as against the defendants E. P. Dutton and Company, Inc., a corporation, and also as against all of the fictitious defendants.

The Court: That is good. That is a condition precedent to trial. The order will be made dismissing as to E. P. [6] Dutton and Company and the fictitious defendants. The case will proceed only against Susan C. Kimmell.

Mr. Mullen: In answer to Mr. Kimmell's point there, your Honor, it is the contention of the plaintiff that any common-law copyright that might apply to "The Gaelic Manuscript" was lost by virtue of the unlimited or general publication of the manuscript by the author, Stewart Edward White, and there is no common-law right of literary property

in the manuscript by virtue of that general publication.

Secondly, by virtue of the general, unlimited publication prior to the year 1944, when Susan Kimmell acquired any right in "The Job of Living," that any formal copyright under the statute would not be applicable to the material in "The Old Gaelic Manuscript," because of its prior abandonment to the public.

The Court: All right. I will hear you, Mr. Kimmell.

Mr. Kimmell: Insofar as Mr. Mullen's statement covers facts, it is substantially correct. I think all I need to say at this stage is that the distribution alleged of the manuscript in question by Stewart Edward White personally and by other people, with his permission, was a limited, qualified distribution. The cases hold that that does not divest the party of any common-law rights.

The Court: As I understand the law of copyright, the circulation of a manuscript in a small group, in itself does [7] not destroy the proprietary right. It is akin to the law of patents, where the making of experimental models, and things like that, do not constitute reduction to practice, which would invalidate the claim of the patent afterwards. It is only when it is done with an intention to dedicate to the public——

Mr. Kimmell: Without discrimination as to persons.

The Court: That is right.

Mr. Kimmell: That is the whole issue in this case, your Honor.

The Court: Let us get the facts in and then we will talk about the law later.

Mr. Mullen: Your Honor, as an aid to brevity, I might call your Honor's attention to probably an issue of law that will arise in this case. It is contained in paragraph IX on page 3 of the answer. They first deny generally any dedication or abandonment to the general public of "The Gaelic Manuscript," and then, commencing on line 8 of page 3, they admit that Stewart Edward White distributed copies of this manuscript and allege, however, only to persons particularly interested in the subject-matter thereof.

Now, also, down in the paragraph commencing at line 14, they admit that Stewart Edward White permitted certain named individuals to reproduce copies of this manuscript by mimeograph and to distribute the same. Then they say, "and in [8] this connection alleges that the said Stewart Edward White instructed them and each of them that copies of said manuscript were to be distributed by them only to persons particularly interested in the subject-matter thereof."

We raise as a matter of law, your Honor, the point as to whether the contention of the defendant that the distribution was to be made only to persons interested is adequate, as a matter of law, to plead a limited publication, for the simple reason that anyone that buys a book is an interested person

and is not a member of a defined or definitely ascertainable class.

The Court: This action, being for declaratory judgment, seeks declaration, unless I dismiss the case on the ground it is not right for declaration, which I have a right to do. It may be a declaration one way or the other. That admission is too general to form the basis of a finding of fact. You would have to find out how many. If you gave it to a hundred people scattered throughout California, that is one thing. If you gave it to ten people in or about his residence, assuming he resided in some definite city in California, that is a different proposition.

It may also be immaterial as to whether the instructions were of such a nature as to have a binding effect upon others. Supposing you give them instructions, and thereafter violate them, and as a result thereof it should develop the manuscript [9] was freely distributed, it then becomes a question of law as to whether, notwithstanding the injunction, in reality there was a general distribution and dedication to the public of the portion of the material which is not published in the other book.

Let us hear all the facts relating to the matter, and then I will discuss with you the law of the matter afterwards.

Mr. Mullen: Plaintiff will call Mr. Harwood White.

HARWOOD WHITE

the plaintiff herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Harwood White.

Direct Examination

By Mr. Mullen:

Q. Mr. White, you are the plaintiff in this action, are you? A. Yes.

Q. Are you related to the former Stewart Edward White? A. Yes. He is my brother.

Q. When did Stewart Edward White become deceased? A. 1946.

Q. Now, are you familiar with the origin and evolution of the so-called "Gaelic Manuscript," which is the subject-matter of this action? [10]

A. Yes, I am.

Q. Now, was "The Gaelic Manuscript" the work of Stewart Edward White during his lifetime?

A. Well, he was supposedly—it was supposedly dictated to him by an invisible, by someone in the spirit world.

Q. Did Stewart Edward White undertake to collect and to compile these alleged communications?

A. Yes. These dictations were always taken down and then were typed, first on Ditto carbon, and

(Testimony of Harwood White.)

then mimeographed on a Ditto machine. A number of people kept complete files in chronological order of these records, through the years.

Q. Now, did you have, personally, occasion to participate in the gathering of portions of the material contained in "The Gaelic Manuscript"?

A. Yes, I would say roughly a third that I took down the dictation in a species of shorthand and later typed and Dittoed the results.

Q. Can you state over what period of time the gathering of the material contained in "The Gaelic Manuscript" took place?

A. It began in 1923 and extended through 1933.

Q. Now, approximately when did Stewart Edward White produce the first copy of "The Gaelic"—or a copy of the manuscript as a manuscript in its present form? A. In the fall of 1933. [11]

Q. Prior to that time, namely, the fall of 1933, did you have occasion to see or observe any of the material contained in "The Gaelic Manuscript" in any other form than their ultimate mimeographed form?

A. Yes. The original records were all sent to me as they came out, and were Dittoed.

Q. When you say "the original records," to what do you have reference?

A. I refer there to the dictation that was taken down and typed and Dittoed. Those are the original records.

Q. Did you ever have occasion to ascertain whether there were other copies of these Dittoed

(Testimony of Harwood White.)

sheets distributed to persons other than yourself?

A. Yes, there were a small group that regularly received these records.

Q. About, approximately, how many, if you know?

A. Oh, I would say perhaps a dozen; might have been a few more, but about that.

Q. Now, were the Ditto sheets which you personally received only those which pertained to material in which you had personally participated in compiling?

A. No, they always sent me complete records of all the various sessions they undertook.

Q. Do you know whether that same state of facts was true as to the other persons who received the same material? [12]

A. No. There were certain ones who received a full assignment of the whole thing.

Q. In addition to yourself?

A. Yes, in addition to myself. And there were some others who came in, in the course of the years, so they didn't get the early records but they got them later.

Q. Have you had occasion to ascertain whether or not "The Gaelic Manuscript" consists in whole or in part of these Dittoed materials sent to you during this 10-year period? A. Only a part.

Q. What is the fact with regard to the contents of "The Gaelic Manuscript"? What does it contain?

A. "The Gaelic Manuscript" contains those dic-

(Testimony of Harwood White.)

tations made only by my brother Stewart, from '23 to '33.

Q. Does all the material in "The Gaelic Manuscript" appear in the Dittoed sheets which were sent to you through those years? A. Yes.

Q. Did you receive materials additionally to those that appear in "The Gaelic Manuscript"?

A. Oh, yes, a great deal more.

Q. Do you know, of your own knowledge, why "The Gaelic Manuscript" does not contain all the materials?

A. Partly because much of the material in the records was dictated through my brother's wife, Betty, and those were [13] not included in "The Gaelic Manuscript" because "Gaelic" appeared only through my brother Stewart.

Q. Is there additional "Gaelic" after the time of the compilation of this manuscript?

A. Yes, he did some more "Gaelic" between '33 and '38.

Q. Does or does not that appear in "The Gaelic Manuscript" that is the subject of this action?

A. No, it doesn't appear in "The Gaelic Manuscript."

Q. At the time that Stewart Edward White, or about the time that he compiled "The Gaelic Manuscript," I think you said about the fall of 1933, did you obtain a copy of the compiled work?

A. Yes, I did.

Q. In what form did you receive it?

A. He sent it to me with a letter, and it was

(Testimony of Harwood White.)

a book, a blue book, paper-bound; not a regular published book, but it was a mimeographed—mimeographed sheets that were bound together in a blue paper binder.

Q. Did you receive any communication of any kind from Stewart Edward White concerning this manuscript at or about the time you got the copy?

A. Yes, I did.

Q. What was the form of that communication?

A. The letter.

Q. Do you now have the letter? [14]

A. No, I don't.

Q. Do you know whether or not such letter is now in existence?

A. I am pretty sure not, because I made no practice of keeping those letters.

Q. Do you have a recollection as to the substance and contents of that letter?

A. Pretty fairly well.

Q. Will you give us the substance of that letter of transmittal that accompanied the manuscript, as best you now recall?

A. Well, he said that he was getting out this preliminary presentation of some of the "Gaelic" material, because he had found there were so many people interested in it and desirous of reading it, that he wanted to make it available.

He suggested that I read it through and then show it to as many people as wanted to read it or that I thought would care to read it.

(Testimony of Harwood White.)

Q. Was this letter signed by Stewart Edward White? A. Yes.

Q. You are familiar with the signature of your brother? A. Oh, yes.

Q. Did you, in fact, circulate the manuscript pursuant to such letter?

A. To a certain extent, yes, I did. [15]

Q. Approximately how many people did you hand the manuscript to, as you best now recall?

A. I think not more than half a dozen, because I circulated the records more than I did the manuscript, the original records.

Q. The original records from which the manuscript was compiled? A. Yes.

Q. Subsequent to your receipt of a copy of the manuscript and the letter concerning which you have given testimony, did you have occasion to thereafter have any conversations with your brother, Stewart Edward White, concerning the manuscript?

A. Yes.

Q. Can you tell us when the first conversation that you recall ever took place?

A. Well, it would have been a matter of a few weeks after I received the manuscript that he came to Santa Barbara and stayed at our house.

Q. Where did the conversation take place?

A. He stayed at our house and we talked there.

Q. The conversation you are now referring to, do you recall who was present?

A. No, I don't. Probably Betty was there and maybe possibly—probably my wife. [16]

(Testimony of Harwood White.)

Q. Now, what was the general substance of that conversation, as you best recall?

A. Well, I——

Mr. Kimmell: Your Honor, I think he ought to use the language exactly as he can recall it.

The Court: If he can.

Q. (By Mr. Mullen): Do you recall precisely what was said at that conversation?

A. I can't recall the language.

Q. Do you recall the substance of the conversation? A. Yes, quite clearly.

Q. Will you give us the substance of that conversation, to the best of your recollection?

A. Well, I asked him, since so many people appeared to be interested in this, why he didn't make a book of it and publish it, the way he had the other books, through Dutton and Company.

He said that he felt that Betty's work should hold the center of the stage and was more important, and he had a number of other books he wanted to get out of hers, that he had in mind. That, therefore, he didn't want to inject himself. He was always very reticent about his own work. He thought hers was more important.

He didn't want to inject himself into the picture. That was the reason he put it out in this informal manner, so that [17] as many people as possible would have an opportunity to read it, without actually putting themselves before the general public in a book.

Q. Now, did you have any subsequent conversa-

(Testimony of Harwood White.)

tions with Stewart Edward White concerning this manuscript?

A. Yes. A matter of a year or two later I tried to get another copy of it.

Q. If I may ask you, Mr. White, where did the next conversation, to which you are now alluding, take place? A. That was in Burlingame.

Q. You say it was about a year after the first conversation?

A. It was within a year or two; it was not very long afterwards.

Q. Who was present, if you now recall?

A. I don't recall that.

Q. All right. Do you remember exactly what was said at the conversation to which you now have reference?

A. No, I can't remember the exact language. Again, I can remember what the substance was.

Q. Will you give us the substance of that next conversation, as you best now recall?

A. A friend of mine wanted a copy of this "Gaelic" because he wanted to be a distributing station for it. Stewart had been interested in having various people all over [18] the United States act as distributing stations for this manuscript, to circulate it among the people.

This particular individual, W. B. Conrad, was very anxious to get a copy, to circulate it among his friends.

I asked Stewart if he could let me have an extra copy for Bill Conrad.

(Testimony of Harwood White.)

He said no, he was sorry he couldn't, because he had sent all his manuscripts out into circulation, lending them around, and that the people had liked it so much that they had all kept them and never sent them back. He just didn't have any more.

Q. Did Stewart Edward White ever make any statement to you as to his reason for his desire to circulate these manuscripts? A. His idea——

Q. Tell us if he made any statement with regard to his intentions in the matter.

The Court: Answer that question yes or no. Then your attorney will ask you to fix a time, approximately.

The Witness: All right. Let me see, I want to be accurate about it. Yes, he did.

Q. (By Mr. Mullen): All right. Approximately when and under what circumstances did he make such statement or reference?

A. Well, in the first conversation I had with him, when [19] he came down to Santa Barbara——

Q. What, if anything, did he say with reference to his reasons for wanting to circulate?

A. Well, he was interested in supplying a demand for this philosophy. He felt the philosophy was very important, and a lot of people wanted it, and he wanted to see they got it.

Q. I take it, Mr. White, that "The Job of Living" is a philosophy of one's life, is that a correct statement?

A. It is roughly in two categories. The "Gaelic" part of it is on the technique of living, that has

(Testimony of Harwood White.)

been published already in a book called "The Job of Living."

There is another entire category, which you might call cosmology or general philosophy of the universe, or life in general, what the world is about, or what the universe is all about. "Cosmology" is about as good as you can get. That, he figured, should be published in another book at some time.

Q. Was Stewart Edward White interested in this matter of philosophy?

A. Yes, he made it his life work.

Q. Do you know whether he undertook to disseminate this philosophy to others?

A. He devoted his entire time to it, after his wife died.

The Court: Did he believe in what is commonly called [20] spiritualism, or what is popularly called that?

The Witness: That is one of those terms that has a lot of bad connotations to it.

The Court: I know it has.

The Witness: He didn't believe in spiritualism, in the seance system.

The Court: He believed in what the scientists call spiritism, the power of people to communicate through others, like Eileen Garrett, who edits the magazine called Tomorrow, is not that correct? She has written books indicating that some of the material was communicated to her by spirits living long ago, and communicated through her.

(Testimony of Harwood White.)

The Witness: Yes. Stewart's attitude was very interesting. To begin with, he was a complete skeptic and very much against it. Through the weight of evidence he was finally—of his wife's work—he was finally won over to, as he put it, that he was too much of a skeptic not to believe, because so many things came up. The explanations got harder to believe than the survival idea, you see.

Q. (By Mr. Mullen): Mr. White, at any time whatsoever did Stewart Edward White orally or in writing give you any instructions or make any statement to you concerning to whom you might distribute or circulate "The Gaelic Manuscript"?

A. No, he made no limitation of any kind.

Mr. Kimmell: I don't think that answer is responsive to [21] the question, your Honor.

The Court: Read the question and answer.

(The record was read.)

The Court: That is correct. Did he say to distribute it to only certain types of people interested in philosophy, or not?

Q. (By Mr. Mullen): Did he make any statement to you that you might distribute it to any person you pleased?

Mr. Mullen: I might strike that and ask this question: I will ask you whether or not the letter of transmittal, concerning which you have given testimony, which was given to you, made any statement concerning the matter of circulation or distribution of the manuscript?

A. Yes, it did.

(Testimony of Harwood White.)

Q. What did the letter state in regard to the matter of circulation?

A. I can't remember the exact words, but the gist of it was that I was to show it to as many people as wanted to look at it.

Q. At the time of Stewart Edward White's death, did you have occasion to examine his books and manuscripts to determine the kind and number in his possession?

A. Yes, I did.

Q. How many copies of "The Gaelic Manuscript" did Stewart Edward White have at the time of his death? [22]

A. Two.

Q. I beg your pardon?

A. Two.

Q. During Stewart Edward White's lifetime did he write a number of books?

A. Yes, he did.

Q. Approximately how many?

A. Sixty-odd.

Q. Did he have these books copyrighted and printed and circulated through commercial channels?

A. Yes.

Mr. Mullen: I think that is all.

Cross-Examination

By Mr. Kimmell:

Q. Mr. White, you mentioned a while ago distributing stations. Will you explain what that term meant, in the connection in which you used it or you said your brother used it?

A. Well, Stewart had a number of very close

(Testimony of Harwood White.)

friends throughout the country, in two categories. In the first category he had a group of close friends throughout the United States who were interested in this work. And he also sent his records and he also sent this manuscript to these special people, with the idea that they would use these manuscripts to show to other people who might be interested; among their friends, in other words. And they could act as a sort of [23] circulating library for the distributing. That was the general idea.

Then later on he abandoned any idea of certain special ones and sent these "Gaelic Manuscripts" out to a very wide group of people, some of whom he didn't know at all, hadn't previously known, but who simply wrote him and asked him if they could have copies.

He sent this manuscript out to them, with the understanding and with the instruction that they would use it to show to other people.

He said, "My interest in sending you this book is not only that you should have it, but that you should show it to your friends." I heard him say that repeatedly.

Q. Why did he want the manuscript shown to other people, as you allege? Was it merely for the sake that they might see this thing which he had produced, or was it for the purpose of acquainting them with the theories of philosophy and metaphysics involved, and the teachings contained therein?

(Testimony of Harwood White.)

In other words, was the purpose to distribute the manuscript or disseminate the theories and the philosophies which constitute the subject of the manuscript?

Mr. Mullen: Excuse me, Mr. Kimmell. You are asking him now whether Stewart Edward White made any statement concerning his purpose?

The Court: That is right. [24]

Mr. Kimmell: Yes, that is right.

The Witness: I don't believe he ever made any distinction of that kind to me. He just said he wanted it circulated widely and—well, the only thing I can say is that he over and again said he didn't want people to get a copy and just put it away and leave it. He wanted people to have it that would show it to others.

The Court: That showed an interest in his idea?

The Witness: Yes.

The Court: In other words, he was interested in people who might be interested in the same ideas as he had?

The Witness: He felt that this work was more important than anything he had done, and that it ought to be widely disseminated, as widely as possible.

The Court: All of us have pet ideas and spread them among people that might be interested in the thoughts we express.

The Witness: It is something like that.

The Court: If that were not so, some of us

(Testimony of Harwood White.)

would not devote \$1,000.00 worth of time to give a speech for which we do not even get paid.

Q. (By Mr. Kimmell): Mr. Witness, is it not a fact that in each instance where he placed a manuscript in the hands of somebody else it was a loan or a gift?

A. Loan or a gift? Yes, he never sold it. [25]

Q. He never sold it? A. No.

Q. Never received any money for any of these manuscripts?

A. Stewart didn't—no, to my knowledge. I never heard him say he received anything. I was never aware of any given instance where he did.

The Court: You did not receive any money?

The Witness: No.

Q. (By Mr. Kimmell): Mr. White, do you know of any instance where Stewart Edward White placed a copy of this manuscript in a public library in California or anywhere else? A. No.

Q. Do you know of an instance where a copy of this manuscript, a copy or copies of this manuscript, appeared on the shelves of a retail bookseller or sellers in California or anywhere else?

A. No, I don't.

The Court: This Ditto process, is that a multi-graph system?

The Witness: Ditto?

The Court: What are you talking about? I have known various methods of reproduction, multi-graphing and duplicating. This is the first time I have heard of this Dittoing.

(Testimony of Harwood White.)

The Witness: It is a sort of a purple carbon paper that [26] you type onto a paper with, and you lay that down on a sheet of gelatin and the typing comes off.

The Court: It is old-fashioned mimeographing?

The Witness: Yes.

Mr. Mullen: I believe the technical term is hectographing.

The Court: It is called that now?

Mr. Mullen: Isn't that correct, Mr. White?

Mrs. Kimmell: Yes.

The Court: There are manuscripts being published that way. I know of a small weekly newspaper in San Diego County that a friend of ours produces in that manner. It is called the Democrat. I happen to know the woman that does it. It is four sheets and it contains editorial comments on current events. It is produced that way and distributed, 500 or 600 copies.

Mr. Kimmell: Your Honor, would you be interested in examining the original hecto? We have it in court here.

The Court: I wanted to know what the process was. How many would you produce in that fashion?

The Witness: The original records were produced by this hectographing method, and I would say perhaps 15 copies were made of those. The manuscripts, subject of this suit, were not made by that method; stencils were cut.

The Court: You can run thousands of copies

(Testimony of Harwood White.)

on that, [27] until it begins to blur, and then you can make a new copy.

The Witness: That is correct.

The Court: I did not know whether that system produced a hundred copies, or what.

The Witness: I found out it produced 15.

Q. (By Mr. Kimmell): Mr. White, do you know of any instance where copy or copies of this manuscript were in a lending library of California, or anywhere else? A. No, I don't.

Q. Your brother, at the time he distributed these copies, was not in the retail book-selling business or running a lending library, was he, for hire?

A. Not for hire, but he always spoke of his "Gaelic Manuscripts," these manuscripts, as his lending library.

Q. I refer to regularly established commercial lending libraries.

A. No, he didn't. He never took money or pay for it.

Mr. Kimmell: That is all, your Honor.

The Court: Is there any redirect examination?

Mr. Mullen: I think not.

The Court: Mr. White, I want to ask one question. Can you tell me the number of persons, the largest number of persons or smallest number of persons, or a number between the largest and smallest, to which any portion of this manuscript was distributed by you? [28]

The Witness: By myself?

The Court: Yes.

(Testimony of Harwood White.)

The Witness: I would say it would be between 30 and 50.

The Court: Each time?

The Witness: Well, I mean—I showed the manuscript——

The Court: As a whole. We are talking about manuscripts. I understand this came out in portions.

The Witness: Yes.

The Court: Well, are you talking about distribution of all the portions put together, or individually, as they came out?

The Witness: Both.

The Court: Both?

The Witness: Yes.

The Court: About 30 persons?

The Witness: 30 to 50.

The Court: Who selected the names?

The Witness: I did.

The Court: You did?

The Witness: Yes. Nobody ever——

The Court: Were they persons of a certain type? What was the type of person? Were they persons whom you knew, or did he have, as all of us who write have, a private mailing list and would turn it over to the secretary and say, "Send these to my usual mailing list," or what? [29]

The Witness: No, there was no private mailing list. Some were people I knew well and others were people I knew slightly. And other people came to me, even from out of town, that heard about it.

The Court: The group was a limited group, chosen by you?

(Testimony of Harwood White.)

The Witness: It was chosen by—I mean, just anybody that happened to come to me that was interested. I never refused it to anybody.

The Court: There were two classes: people whom you chose because you thought they would be interested——

The Witness: Yes.

The Court: ——and people that had heard about it and came to you and asked you?

The Witness: Yes.

The Court: Those groups covered 30 to 50 persons to whom you distributed?

The Witness: Yes.

Mr. Kimmell: May I ask one more question?

The Court: Yes.

Q. (By Mr. Kimmell): You stated you let anyone see it who came to you? Was there anyone who was not particularly interested in the subject-matter in the manuscript—would they be apt to come to you?

Mr. Mullen: That is an argumentative question. [30]

The Court: This is cross-examination. Mr. White may answer, if he can.

The Witness: I can't imagine anybody would ask to see something they weren't interested in, regardless of what it was.

Mr. Kimmell: That is all.

The Court: Step down.

(Witness excused.)

Mr. Mullen: Come forward and be sworn, please, Mrs. Maguire.

W. N. MAGUIRE

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: W. N. Maguire.

Direct Examination

By Mr. Mullen:

Q. Now, Mrs. Maguire, were you acquainted with Stewart Edward White during his lifetime?

A. Yes, sir.

Q. In what capacity did you know him and over what period of time?

A. As his secretary, from the early spring of 1919 or 1920 until the time of his death.

Q. When did his death occur? [31]

A. In '46, the fall, September, I think.

Q. Did you have occasion to serve him as his secretary then during the period from 1919 to 1946?

A. Yes, I did.

Q. Now, are you familiar, Mrs. Maguire, with the mimeographed manuscript which we have referred to as "The Gaelic" or "Old Gaelic Manuscript"?

A. Yes, I am.

Q. Will you state the conditions under which you first became familiar with "The Old Gaelic Manuscript"?

A. I knew that Mr. White was working on it,

(Testimony of W. N. Maguire.)

because of occasional mention, but I heard of it definitely and saw it for the first time when he brought it to my house and asked me to make a figure.

He paid me, not per month, but by the work I did for him. He asked me to give him a figure on making a certain stated number of mimeographed copies of it, because he wished to distribute more than his hectograph copies had allowed him to do.

Q. When you say you first saw it, in what form was the material at the time that you saw it?

A. The material was in what we call his original Ditto copy.

Q. Is the word "Ditto," as you used it there, synonymous with the word "hectograph"? [32]

A. Yes, but his hectograph was a Ditto machine. It was named that, so we always called it that.

Q. It was the gelatin process of running sheets off of indelible ink imprinted on there?

A. The typing was done with an indelible ribbon, a purple ribbon, on your typewriter. You had to be careful not to touch the page. This page was turned on the gelatin substance, and the prints were made.

Q. Those that were brought to you were the ones concerning which you are giving testimony?

A. Yes.

Q. What, if anything, did you say with regard to Mr. White's inquiry as to the cost of mimeographing?

A. I told him how much, approximately, it would

(Testimony of W. N. Maguire.)

cost, and he said to go ahead and make him 60 or 70 copies of it.

Q. Did you, upon receiving that instruction, make mimeographed copies?

A. I proceeded at once to cut the stencils and secure the proper paper, which could be printed on both sides, and made the copies he asked for.

Q. Do you know exactly how many copies were made, or can you give just your best estimate?

A. As I recollect, he wished to have 60 or 70, and I think that is what I produced.

Q. Somewhere in that general vicinity? [33]

A. In that neighborhood, yes.

Q. Did you have these copies covered or bound in any fashion?

A. I had them bound in the local newspaper shop. I had no press facilities.

Q. I show you at this time, Mrs. Maguire, a mimeographed manuscript which has a light blue cover on the front and back, and a dark blue binding, and I ask you if you recognize what this object which I now hand you purports to be.

A. Yes, this is one of the first issues or first printings that we made of "The Gaelic Manuscript."

Mr. Mullen: Do you wish to examine this, Mr. Kimmell?

Mr. Kimmell: Yes.

Mr. Mullen: We would like to offer this as plaintiff's first exhibit in order, and ask it be received and marked.

The Clerk: Is this admitted, your Honor?

(Testimony of W. N. Maguire.)

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 1 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 1 and received in evidence.)

Q. (By Mr. Mullen): Now, what happened or what was done with the copies of Plaintiff's Exhibit No. 1 upon the completion of the binding, if anything, Mrs. Maguire?

A. They were delivered back to my office, at which time I called Mr. White's home and told him they were ready. [34]

Q. Following that call, did or did not Mr. White come to your office?

A. He came to the office, either that day or the next morning; I don't recollect now. He had a list of names to whom some of them were to be sent, and a record containing the dictation of the letter he wished to go with them.

Q. When you say "a record containing the dictation," what do you mean by the term "record"?

A. Mr. White dictated all his correspondence on the records of an Ediphone. I had the transcriber in my office, and he brought the records to me for transcription.

With the records he always handed me either the letters that were to be answered or the list of names and addresses to whom the letters he had dictated were to be addressed, so that he saved space on his records.

(Testimony of W. N. Maguire.)

Q. On this occasion you say he handed you a list of names? A. That is right.

Q. And a letter dictated on a record?

A. That is right.

Q. What is the fact with regard, or, did he ask you to write any letters at that time?

A. He asked me to write these letters and get them ready as quickly as possible, because he was anxious to send them out. [35]

Q. How many persons did he request that letters be prepared to?

A. As near as I recall at the time, remembering the stack of books on my desk, I think we had 18 or 20 books to send out, and letters to go with them, at that first writing.

Q. Did he dictate the same or a different letter to go to these 18, or thereabouts, recipients of the manuscript?

A. Both. The first paragraph was to go to all of them, and then the personalities or any other news he wished to give the recipient, or information, was added to each one, name by name.

Q. Now, did you have occasion then, pursuant to his handing you the record and the list of names, to prepare letters to some 18 persons, or thereabouts, to accompany the mailing of these books?

A. Yes, I did.

Q. Upon completion of the transcribing of these letters, Mrs. Maguire, did you tender them to Mr. White for signature?

A. He picked them up the next day.

(Testimony of W. N. Maguire.)

Q. Were the manuscripts and the letters written by you then dispatched to the persons to whom addressed? A. Yes, they were.

Q. Do you have a copy at this time of the letter or letters written to these 18, or thereabouts, persons, under the circumstances you have just described? [36] A. No, I do not.

Q. Do you know whether or not at this time any copy of that original letter exists?

A. I am sure it does not.

Q. Do you have a recollection of the contents of the transmittal letter? I believe you said it was standard as to part and—— A. That is true.

Q. With regard to the portion that was standard to all of these letters, do you have a recollection as to the contents of the letter?

A. A general recollection, yes, partly because of writing it over and over, and partly because the wording it contained was the policy concerning this manuscript throughout all the following years.

Q. Do I understand he asked you to write this same letter on other occasions?

A. Yes. More books were sent out on later dates, one or two at a time, or three or four at a time, as he secured names to whom he wished the books to go.

Q. Did he make any statement to you as to whether or not you were to preserve this same letter for future use?

(Testimony of W. N. Maguire.)

A. Yes. He asked me on the occasion of giving me the first records, when the larger number was sent out, to be sure and save a carbon, because he would be saying the same first [37] paragraph when he sent out books in the future.

Q. Will you tell us now, as you best recall, the substance of that transmittal letter that accompanied the mailing of the manuscripts?

A. The general verbiage was to the effect that "I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise, you are at liberty to keep it."

Q. Do I understand that after the initial mailing, a day or two after the Plaintiff's Exhibit 1, or the group of some copies that were produced concurrently with Plaintiff's Exhibit 1 were mailed, you from time to time thereafter mailed out other copies?

A. Yes, I did.

Q. Did you on each occasion send substantially the same letter of transmittal?

A. As near as I can recall, we always did.

Q. On any of the occasions of mailings, did Mr. Stewart Edward White make any statement to the persons to whom such manuscripts were being mailed, as to whom they might allow to read the manuscripts? [38]

A. No, he did not.

(Testimony of W. N. Maguire.)

Q. Did he ever make any statement limiting their use or distribution of the manuscripts, to your knowledge or recollection?

A. No, he did not.

Q. Out of the original run of copies, how long did he have those, if you know?

A. It could have been a year or a little more, I should think, as I recall.

Q. What became of the other copies that were not sent through the mail?

A. He took the larger quantity that was left over to his own house, to distribute to callers who came or to people he happened to meet. He left several with me, which I myself distributed.

Q. How many people did you distribute the manuscript to?

A. I think four or five copies.

Q. Were these all persons who were known to or friends of Stewart Edward White?

A. Well——

Q. Or friends of yours?

A. They were either friends or clients of mine. They were people that had occasion to come to my office and knew I was Mr. White's secretary, and who were interested in the sort of work he was doing at the time. [39]

Q. Were some of those people, who were known to you, unknown to Mr. White?

A. Personally, yes, they were unknown to him.

Q. Were they members of any particular group or association?

(Testimony of W. N. Maguire.)

A. No. There was no group.

Q. At the time Mr. White gave you copies of the manuscript to keep in your office, or at any other time, did he ever tell you to whom you might distribute these manuscripts?

A. He never did.

Q. Now, did you ever have a conversation with Mr. Stewart Edward White concerning the original run of copies, as to how long they lasted or what he did with them?

A. At the time he had used them all up, yes, he came down and said, "Have you any left you kept here? I am all out. What are we going to do?"

I told him no, I had used up my extras, I only had the one he had given to me for myself.

And he said, "Well, I need more."

So I told him I had, as we had planned in the first place, saved the stencils and would make a re-run for him, which I did.

Q. On the second run, how many copies did you make, if you know?

A. Well, I don't have a definite recollection, but I [40] assume, because it would have been impractical to make any less, I made at least 50.

Mr. Kimmell: Could I have that answer read?

(The answer was read.)

Mr. Kimmell: I want to point out, your Honor, that the assumption should be taken with reservations.

The Court: That is all right. That is a question of weight to be given. I will take care of that.

(Testimony of W. N. Maguire.)

Q. (By Mr. Mullen): Will you give us your best recollection, Mrs. Maguire, if you have a recollection, as to the number of copies run?

A. I think it was 40 or 50.

Q. Now, I show you at this time another manuscript, which this time has a single blue cover running all the way around, and mimeographed sheets, and I will ask you to examine this object.

A. This is one of the second run that we made in our office.

Q. You recognize that as being one of the second run of documents or manuscripts?

A. I recognize it as such.

Mr. Mullen: We will offer this as plaintiff's second exhibit in order and ask it be received and so marked.

The Court: All right.

The Clerk: Plaintiff's Exhibit 2 in [41] evidence.

(The document referred to was marked Plaintiff's Exhibit No. 2 and received in evidence.)

Q. (By Mr. Mullen): Now, then, Mrs. Maguire, what was done, if you know, with the copies of the second run of "The Gaelic Manuscript"?

A. In toto, the same as with the first. He took the most of them home. There was not at that time, because a number had been distributed before, there was not at that time a large mailing. As nearly as I can recollect, he took them all home.

Q. From time to time, after the run of the sec-

(Testimony of W. N. Maguire.)

Q. Second group of manuscripts, did you have occasion to write letters of transmittal and to mail copies of the manuscript to various and sundry persons?

A. I did.

Q. Can you state whether or not the persons to whom you mailed the copies of the second manuscripts were persons known in toto to Mr. Stewart Edward White?

A. Not all of them, personally. Many of them were people who had written to him and he had no personal acquaintance with them at all. They might have written because—the contents of their letter, which I always saw, would show they had written to him because of acquaintance with some friends who had the book, or having read some of his other books, and knowing of his work. [42]

Q. You are basing your answer on contents of communications you personally saw?

A. I am.

Q. And as to statements by Mr. Stewart Edward White? A. Yes.

Q. With regard to these letters of transmittal written to persons not known to Mr. Stewart Edward White, did he at any time in his correspondence accompanying these mailings place any limitations on the use they might make of the manuscript or the persons to whom they might hand it? A. He did not, no.

Q. What did he say, if anything, with regard to the right of distribution?

A. Generally, the same thing as he said in his

(Testimony of W. N. Maguire.)

first letter that he had dictated, that they were perfectly at liberty to show it to anyone that was interested in the contents.

Q. Can you give us an approximation, Mrs. Maguire, of approximately how many people over a period of time you mailed these manuscripts to, in various parts of the country?

A. Including those I mailed from the first printing and second printing, it would probably total between 45 and 55, I should say.

Q. It would be your best recollection that you dispatched, then, some 45 to 55 copies at various times? [43]

A. Yes.

Q. Were those to all parts of the United States or to some particular place?

A. They were to all parts of the United States.

Q. Can you give us any approximation as to how many of those copies and mailings were to persons unknown to Stewart Edward White, who had simply written to him asking him for one?

A. That would be very difficult, because it has been such a long time. I should say possibly at least a third or maybe a little more, where people who had merely written, who had no personal acquaintance with Mr. White.

Mr. Mullen: May we have the deposition of Mrs. Oettinger opened?

The Court: It is attached to the——

The Clerk: It is present here, your Honor, in a separate envelope.

The Court: What is this, one deposition of——

(Testimony of W. N. Maguire.)

Mr. Mullen: No, your Honor. The deposition of Mrs. Oettinger.

The Court: We will take a short recess while you get the deposition.

(Short recess taken.)

Q. (By Mr. Mullen): Now, at this time, Mrs. Maguire, I show you a photostatic copy of a letter which is marked [44] "Plaintiff's Exhibit 1 for identification," and which has accompanied the deposition of Mrs. Oettinger, and I will ask you whether or not you recognize the document which I now hand you. A. Yes, I do.

Q. Will you state what it is?

A. It is a letter dictated by Mr. White to Mrs. Frank Oettinger, in Portland, Oregon.

Q. Is this a true photostatic copy of an original letter prepared by you? A. It is.

Q. I call your attention to the reverse side of this photostat, to a signature, and ask you if you know whose signature that is. A. Yes.

Q. Whose signature is that?

A. It is the signature of Stewart Edward White.

Q. You have seen that signature many times?

A. Yes.

Q. This purports correctly to portray transcribed by you from dictation by Mr. Stewart Edward White? A. That is right.

Q. I direct your attention to the second page or reverse side of this photostat, to a portion, a paragraph that reads as follows: [45]

(Testimony of W. N. Maguire.)

“As to the Gaelic, Sue Kimmell is quite right in saying that you may go ahead at your discretion with more copies of it. And your friend, Barbara Delkin, got the wrong impression. I have no objection whatever to the distribution of copies of Gaelic, provided, of course, it is not in published form.”

This symbol here, these letters, what are they?

A. That is my stenographic symbol (indicating).

Q. Did Mr. Stewart Edward White dictate that to you? A. He did.

Q. You correctly transcribed his dictation?

A. That is right.

Mr. Mullen: I offer that in evidence.

The Court: It may be received.

The Clerk: That is Plaintiff's Exhibit 3 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 3 and received in evidence.)

Q. (By Mr. Mullen): In your capacity as Mr. White's secretary, did you handle any other correspondence between Mrs. Oettinger and Stewart Edward White?

A. Yes, a number of letters before this one was written, when she was a resident of Palo Alto, California.

Q. Do you at this time, Mrs. Maguire, have copies of the correspondence that was received and

(Testimony of W. N. Maguire.)

written by Stewart Edward White with Mrs. Oettinger? [46] A. No, sir, I do not.

Q. Do you know whether or not at this time such copies are in existence?

A. I think probably not.

Q. Can you recall generally the substance or purpose of the correspondence?

A. Yes. I remember that the first letter I saw from her and that the first letter I was asked to transcribe in reply to it, was one she wrote Mr. White saying she had just been allowed to read a copy of "Gaelic" by a Mrs. Katherine Benner in San Mateo, and it had fascinated her so much and interested her so intensely she would like to have other copies and was that possible.

Mr. White replied in a very short letter he had no more copies, he was sorry, but she might, with Mrs. Benner, when Mrs. Benner was through with it, she might make whatever use she could of this one copy.

As I recollect, she replied almost at once that since she was so deeply interested she would like more than one copy and would it be possible, would he allow her to make some mimeographed copies for herself.

Q. What was Stewart Edward White's reply, if any, to that request?

A. He replied she was at liberty to do so, he would be glad to have her do it if she wished. [47]

Q. In any of the correspondence between Mrs. Oettinger and Mr. White, prepared or written by

(Testimony of W. N. Maguire.)

you pursuant to his dictation, did he at any time place upon her any limitation or restriction as to whom she might circulate these copies that were to be made by her?

A. No limitation in any correspondence——

Mr. Kimmel: Your Honor, I think, instead of using those general terms, “restrictions” or “limitations”——

The Court: This witness was his secretary. They are dealing with letters which, if they existed at all, must be in your possession, because they are letters alleged to have been written to your client, so if anyone has them your client has them. If she does not have them, then the best they can do is resort to memory.

Mr. Kimmell: The only point I wanted to raise is that I am not trying to be picayunish or delay this thing, but to avoid the statement of conclusions as far as possible.

The Court: He wanted to find out the contents of these letters. The generalities are necessary when we are dealing with contents of letters.

Now, we have one letter which tells us or gives us the limitation, because he said to copy them or distribute them, but they were not for publication, so there we have a limitation.

You could not modify that, you could not ask for any [48] greater modification nor for anything to explain that. But as to letters which are not before the court, they have a right to inquire di-

(Testimony of W. N. Maguire.)

rectly or indirectly as to what they contain. You may answer.

Mr. Mullen: If I might correct that. I believe you referred to or perhaps assumed that the letters now under discussion were to the defendant in this case.

The Court: No.

Mr. Mullen: We are referring to a Mrs. Oettinger, a third person, not a party to this lawsuit.

The Court: I beg your pardon. I was in error.

Mr. Mullen: Mrs. Oettinger is a third person whom we allege in our complaint was one of several persons permitted to reproduce and distribute copies.

The Court: That is all right. That is the person whose deposition you had taken?

Mr. Mullen: Yes, your Honor.

The Court: It is my error. The argument is valid, so far as the letters are concerned, as they are not before the court. Go ahead.

Q. (By Mr. Mullen): In any of the correspondence between Stewart Edward White and Mrs. Oettinger, did he make any statement to Mrs. Oettinger as to whom she might or might not distribute the copies which she would reproduce?

A. No, he did not. [49]

Q. Did you ever have occasion to handle or to process any communications or letters between Mrs. Oettinger and Mr. White relative to Mrs. Oettinger charging a price for the copies which she would reproduce?

A. Yes, I did.

(Testimony of W. N. Maguire.)

Q. Will you give us the substance of that series of letters, or letter, whatever the case may be, as you best now recall?

A. Some months after her first inquiry as to whether or not she might be allowed to make stencils—that was an interval in which she completed them—she wrote another letter telling Mr. White she had finished the work, but she had not been able because of lack of time to cut the stencils herself. She had had to hire some of them done, and buy paper, and so forth, and would he mind if she made a nominal charge to cover the costs she had incurred?

Naturally, she couldn't afford it all herself. I remember that we discussed that particular letter before he dictated his reply, because he wanted an idea from her as to what each copy might cost, and we went over the original costs that I charged him some several years before, for the work that had been done.

He replied to Mrs. Oettinger in general that it would be all right. I forget his exact wording. That she should let him know. He particularly asked that she let him know what [50] the costs were and what she proposed to charge per copy to those she handed the book to.

Q. Did you ascertain subsequently the charges made by Mrs. Oettinger?

A. If I did I don't recall what they were.

Q. You do recall, do you, a conversation, or.

(Testimony of W. N. Maguire.)

rather, communication from Stewart Edward White authorizing Mrs. Octtinger to make a charge in connection therewith?

A. I do recall that letter, definitely.

The Court: Did you ever have any report from her giving you the details as to how many persons she gave copies to or what she charged?

The Witness: I do recall, your Honor, she sent occasional letters to Mr. White, giving him exactly that kind of report. It has been a great many years since then. I don't recall how many copies or how much money she might have taken in.

The Court: Did the letters contain the names of persons to whom the manuscript had been given?

The Witness: Oh, no, they did not. I know in the letters I saw no list of names and addresses that were ever given him.

Q. (My Mr. Mullen): Now, Mrs. Maguire, at the time of Mr. Stewart Edward White's death, did you have occasion to examine his library of books and manuscripts and determine the [51] number of copies of "Gaelic Manuscript" remaining in his possession at that time?

A. Yes, I did. I was gathering these things up all the time——

Q. How many copies?

A. ——and getting them in order.

Q. Excuse me. How many copies of "Gaelic" did Mr. White himself retain as of the time of his death?

A. Of course, he had the one or two, what we

(Testimony of W. N. Maguire.)

called original "Ditto" records, that were never let out of his possession. One was what he called a library copy and the other was a work copy, because he could make marginal notes.

There were several copies of these mimeographed ones, one or two or three, perhaps.

Q. Did you have occasion as his secretary, from time to time, to see mimeographed copies of this "Gaelic Manuscript" that had been produced by other persons, other than yourself?

A. Yes, I have, on occasion.

Q. On how many occasions have you seen manuscripts, copies of "The Gaelic Manuscript" made by others than yourself?

A. I have several times seen a copy of one that Mrs. Oettinger made in Mr. Harwood White's possession. And I recall probably one of Mrs. Oettinger's copies, it must have been, because it had a brown cover on it, as I recall, in Mr. Stewart Edward White's office. [52]

Q. Did you ever seen a copy prepared by a Mrs. Duce of New York?

A. I don't recall that I did.

Q. Do you know, by reason of any contact with correspondence, whether other persons than yourself and Mrs. Oettinger did make copies of this manuscript?

A. Yes, I know that a Mrs. Duce did make some copies.

Mr. Mullen: I think that is all.

(Testimony of W. N. Maguire.)

Cross-Examination

By Mr. Kimmell:

Q. Mrs. Maguire, you stated that you were Mr. White's secretary. Isn't it a fact that the chief secretarial duties which you performed——

The Court: Raise your voice, Mr. Kimmell, please. You drop your voice.

Q. (By Mr. Kimmell): Isn't it a fact that the chief secretarial duties you performed for Mr. White was making copies or typing copies of letters and manuscripts from Ediphone records prepared by him in his own study, in your absence?

A. Yes, I was. During those early years of my secretaryship I was never present in his own office. I had my own office down in the Village.

Q. Wasn't that about the arrangement all through your relationship with Mr. White? [53]

A. My duties were to do whatever he asked me to do, Mr. Kimmell. They included——

Q. They——

Mr. Mullen: Let her finish, please, Mr. Kimmell.

Mr. Kimmell: I am sorry.

The Witness: They included, first of all and principally, the typing of the manuscript he had written mostly by hand, one, usually one book each year.

They included from three to a dozen records each week, dictated in his office to an Ediphone and brought to me to be transcribed into original and

(Testimony of W. N. Maguire.)

copies, if he asked for them, of letters to be written to his correspondents.

Then it included the compilation of his monthly bills, the writing of all checks in payment of them. During his absence, in his long summer vacations, the signing of those checks or seeing that the bank issued bank checks for them.

Looking after, in general, his home, his servants and his estate, when he was away. During two long trips that he was away in Africa, and every summer in Alaska for 17 years.

Q. (By Mr. Kimmell): But generally the transcription work you did was done in your office from Ediphone records prepared by him?

A. It was, with the exception, for the last three years of my association with him, at which time I lived at his home and did a great deal in his office or in my own rooms in his [54] home.

The Court: Are you a stenographer or just a typist?

The Witness: I am a stenographer.

The Court: You write shorthand?

The Witness: I write shorthand, yes, sir.

Q. (By Mr. Kimmell): During the last years of Mr. White's life, isn't it a fact that you lived in a separate cottage on the grounds of Mr. White's home?

A. That is true. I lived in what they called the gardener's cottage, about 15 or 20 steps from the back door of the main house.

The Court: That is all right. Some of the places

(Testimony of W. N. Maguire.)

denominated as such in Santa Barbara and Palm Springs are castles.

The Witness: This was a castle, your Honor.

Q. (By Mr. Kimmell): Mrs. Maguire, do you know, of your own knowledge, of any occasion or any time when any copy or copies of this manuscript in question, "The Gaelic Manuscript," were on display or deposited in a public library or libraries in California or anywhere else, so that anybody, irrespective of persons, could call for it and see it?

A. No, I know of no such occasion.

Q. Do you know of any occasion when a copy or copies of the manuscript in question were on the shelves of a retail bookstore in California or anywhere else? [55]

A. I have no such knowledge, no, sir.

Q. Do you know of any occasion when copy or copies were in a commercial lending library?

A. No, sir.

The Court: To follow that up, except in this particular instance when Mrs. Oettinger asked permission to charge for the cost of typing additional copies, that any charge was made to anyone for——

The Witness: That is true. Mr. Stewart Edward White was amply able to pay me the costs incurred in doing the work I did.

The Court: With the exception of that request, you do not know of any instance where anyone paid money for a manuscript?

The Witness: That is true.

(Testimony of W. N. Maguire.)

The Court: The manuscripts were given to particular persons without compensation?

The Witness: That is right.

The Court: And not even the cost of mimeographing or dittoing that you talk about was charged?

The Witness: No.

The Court: Except the particular instance you speak about.

The Witness: Yes.

The Court: All you know is she asked for permission? [56]

The Witness: She asked for permission.

The Court: You do not know what she received?

The Witness: No.

The Court: Or from whom?

The Witness: No, I do not.

Q. (By Mr. Kimmell): Mrs. Maguire, do you know, of your own knowledge, whether or not Mrs. Oettinger was in any business, that is, any business of running a bookstore, retail bookstore, or public lending library?

A. She was not. She was the wife of an attorney and lived in her own home.

The Court: Where is she from?

The Witness: She lived in Palo Alto at the time the correspondence began, and later her husband moved to Portland, Oregon. The only business she mentioned in her correspondence to Mr. White was when she first projected the idea of making

(Testimony of W. N. Maguire.)

the copies of "The Gaelic Manuscript," and she said because of her three or four days work a week in this building called the National Transcribers of the Blind in Palo Alto, she had access to a mimeograph machine which she was at perfect liberty to use, to facilitate and make the work easier.

Q. (By Mr. Kimmell): That business had nothing to do with the retailing of books?

A. No, sir.

Mr. Kimmell: I think that is all. [57]

The Court: Do you have any redirect examination?

Mr. Mullen: None, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Mullen: At this time we have the deposition of Mrs. Oettinger, and it is agreeable with counsel, subject to whatever your Honor's pleasure may be, to read it in court, or if your Honor prefers we are willing to have it read in chambers.

The Court: If you will waive all objections in the record, then I will give it an exhibit number and order it transcribed in any record to be prepared on appeal, and I will read it between now and the afternoon session.

Mr. Mullen: So stipulated on the part of the plaintiff.

Mr. Kimmell: So stipulated on the part of the defendant.

The Court: That is the way I handle depositions. The only ones that I require reading of is where counsel insist on objections. Then, of course, I have to read portions enough to realize what it is all about.

Mr. Mullen: We offer the Oettinger deposition.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(The said deposition of Margaret Oettinger was marked Plaintiff's Exhibit No. 4 and received in evidence, and is in words and figures as follows:) [58]

PLAINTIFF'S EXHIBIT No. 4

Deposition of Margaret Oettinger

Be It Remembered that on the 11th day of November, 1950, at the hour of 9:30 o'clock in the forenoon of said day, in the office of Rhoten & Rhoten, 311 Pioneer Trust Building, Salem, Oregon, personally appeared before me, J. Ray Rhoten, a Notary Public in and for the said County of Marion, State of Oregon,

Margaret Oettinger, a witness on behalf of plaintiff, for the purpose of giving her deposition at the request of plaintiff, pursuant to stipulation on file herein, and further stipulation hereto annexed;

Plaintiff appearing by Mr. J. Ray Rhoten, attorney at law, acting on behalf of Schauer, Ryon & McMahon, attorneys for plaintiff;

Plaintiff's Exhibit No. 4—(Continued)

Defendant Susan C. Kimmell appearing by Mr. Charles Lovett, attorney at law of Salem, Oregon, acting on behalf of Leslie F. Kimmell, attorney for said defendant;

Miss H. J. Bratzel, a competent, qualified shorthand reporter, having been appointed by me to report in shorthand the proceedings then and there had;

Thereupon the following proceedings were had, to wit:

Mr. Rhoten: It is stipulated by and between J. Ray Rhoten, acting on behalf of Schauer, Ryon & McMahon, attorneys for plaintiff, and Mr. Charles Lovett, acting on behalf of [59] Leslie F. Kimmell, attorney for defendant Susan C. Kimmell, that J. Ray Rhoten, having been appointed by stipulation dated October 27, 1950, between Schauer, Ryon & McMahon, attorneys for plaintiff, and Leslie F. Kimmell, attorney for Susan C. Kimmell, one of defendants, to act as notary public for the purpose of taking the deposition of Margaret Oettinger, a witness on behalf of plaintiff, and having been further appointed to act as attorney on behalf of plaintiff in the matter of said deposition, may so act for the purpose of propounding the interrogatories to Margaret Oettinger, and no objection will be raised to his acting in such capacities.

Mr. Lovett: That is correct and that is agreeable with the defendant Susan C. Kimmell.

Plaintiff's Exhibit No. 4—(Continued)

Mr. Rhoten: It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the deposition of Margaret Oettinger, a witness on behalf of plaintiff, may be taken before J. Ray Rhoten, a Notary Public for Oregon, as by law provided, and pursuant to stipulation, on this 11th day of November, 1950, at the hour of 9:30 o'clock in the forenoon of said day, at the office of Rhoten & Rhoten, 311 Pioneer Trust Building, Salem, Oregon, on oral interrogatories to be propounded to said deponent by respective counsel, pursuant to statutory provisions and this stipulation;

It is further stipulated that all irregularities as to [60] notice of time and place and manner of taking said deposition are hereby waived; that each party reserves the right to object at the time of the trial to any question or answer as to the competency, relevancy and materiality thereof, but the objections to the form of the questions are waived unless made at the time the question is asked; that said deposition may be used upon the trial of the within-entitled cause;

It is further stipulated that Miss H. J. Bratzel, a competent, qualified shorthand reporter, be and she is hereby appointed to take the proceedings and the whole thereof had in connection with the taking of the deposition of said Margaret Oettinger, and that she shall thereafter transcribe the same into typewriting, and when so transcribed the said

Plaintiff's Exhibit No. 4—(Continued)

deposition shall be read to or by the said Margaret Oettinger, and by her subscribed in the presence of J. Ray Rhoten, notary public for Oregon.

MRS. MARGARET OETTINGER

was thereupon first duly sworn by me, J. Ray Rhoten, Notary Public for Oregon, to tell the truth, the whole truth, and nothing but the truth, and was examined and testified as follows:

Direct Examination

By Mr. Rhoten:

Q. Where do you live, Mrs. Oettinger?

A. 874 Cascade Drive.

Q. In Salem, Oregon? A. Yes. [61]

Q. How long have you lived in this area?

A. Since March 8, 1949.

Q. And where did you live prior to that time?

A. Portland, Oregon.

Q. And you are acquainted with Stewart Edward White? A. Yes.

Q. And when did you become acquainted with him? A. In the spring of 1941.

Q. And where did you become acquainted with him?

A. I first saw him at his home in Burlingame, California.

Q. And did you visit back and forth with him after that? A. I was there twice.

Q. And was he ever over to visit you?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

A. No.

Q. Was the nature of your acquaintance with him with respect to a manuscript called "Old Gaelic" or "Gaelic"? A. Yes.

Q. And did you discuss that manuscript the first time you met him?

A. Yes, that was the purpose of my visit there.

Q. And had you heard of that manuscript prior to your meeting Mr. White? A. Yes. [62]

Q. And by any chance was through a Mrs. Kimmell? A. No.

Q. Now, this meeting with Mr. White, can you tell us the discussion which was had with Mr. White relative to the manuscript "Gaelic" or "Old Gaelic"?

A. Yes. Mr. White invited me and my friend, Ada Wyman, to come to his home to discuss the possibility of making further copies of "Gaelic."

Q. And then at that time—at Mr. White's home, yourself, Ada Wyman and Mr. White were present?

A. And my husband.

Q. And your husband. And can you tell us the conversation that took place there with respect to Gaelic or Old Gaelic manuscript?

A. Not verbatim.

Q. I understand that, but generally.

A. Mr. White said he had no objection to further copies being made. At that time he was not at all sure that he would ever publish it. He thought

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

that it was not necessary to publish it by itself. He had quoted from it in various books, and he thought it would be all right if we made some mimeographed copies.

Q. And was anything said at that time about your selling the mimeographed copies that you made of the manuscript?

A. There was no definite agreement made about it, but [63] he understood that I was to charge enough to pay for the materials, at any rate. In fact, he never made any specification or any definite statements at all about the matter of recompense for making the copies.

Q. And was there any statements at that time made with respect to where you would sell or distribute the manuscripts which you made, or the copies which you made?

A. No. I hadn't had very much experience with it at that time, and I knew of two or three people who wanted copies, and that is all I knew about it, that two or three people wanted copies, and he said he knew several people who would like to have copies, and he gave me from time to time the names of people who would like to have copies of this manuscript. Several of the copies I disposed of were sent to people whose names were given to me by Mr. White.

Q. Did you have a copy of the manuscript before you went to see Mr. White?

A. Yes. I had borrowed a copy from Mrs.—Dr

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Benner, I can't think what his name was—Katherine Benner. Katherine Benner of San Mateo.

Q. Did she have several copies?

A. I think she only had one. She might have—I don't know whether she had more than one or not.

Q. Was there any discussion at that time, and, if so, what was it, with respect to the circle of people that you [64] could distribute your copies to?

A. As far as I recall, he made no limitations at all on my disposal of copies.

Q. Did he—was there any discussion there at that time with respect to how many you could make or distribute?

A. No, he never mentioned any number at all. We started out to make—I can't remember positively how many we made. I thought it was thirty. I wrote to Ada Wyman and asked her if she remembered how many we made, and she said she thought it was fifty or sixty.

Q. At the time of the discussion there was nothing said about it?

A. No, he just gave us a free hand.

Q. With respect to the number and the people you could distribute to, and the price?

A. Yes. No price was ever mentioned between Mr. White and me.

Q. No limitation on the number which you could produce? A. No.

Q. Nor limitation on the people to whom you could distribute? A. No.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. Then you had another discussion with him later then about it?

A. No, the second time I went to see him wasn't about [65] that at all. It was about another matter.

Q. And when did you see him the next time then?

A. I think it was in January or February of 1942. It was just about that time.

Q. And you haven't seen him since that time?

A. No, I haven't. I have corresponded with him some, but I haven't heard from him.

Q. With respect to correspondence with him, I think you have a letter of May 18, 1945, from him, do you?

A. That is right.

Q. And do you have that with you?

A. Yes.

Q. And does that letter mention the "Old Gaelic"?

A. Yes.

Mr. Lovett: I think maybe you better introduce that.

Mr. Rhoten: I think so. May we have that? You might not get that back for a long time.

A. You better not take it then, because that is the only thing I have with his signature on it.

Q. Now, Mrs. Oettinger, I hand to you Plaintiff's Exhibit 1 for Identification and ask you what that is.

(Letter referred to handed to reporter and marked "Plaintiff's Exhibit 1 for Identification," and thereupon handed to witness.)

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

A. This is a letter that I received from [66] Stewart Edward White written on May 18, 1945.

Q. And of how many pages is it composed?

A. About a page and a quarter.

Q. And do you know the signature of Stewart Edward White? A. Yes.

Q. And does it appear thereon?

A. It does.

Q. And that is the letter which you received from him about that time? A. Yes, it is.

Q. We offer that into evidence with the understanding with counsel for the defendant, Susan C. Kimmell, that a photostatic copy may be substituted and placed with the deposition in place and stead of the original.

Mr. Lovett: That is agreeable with the defendant.

Mr. Rhoten: And you have no objection to it being introduced into evidence?

Mr. Lovett: No.

Mr. Rhoten: Are you authorized to allow it to be received?

Mr. Lovett: I have no instructions on that.

Mr. Rhoten: We better stipulate that neither attorney for plaintiff nor attorney for defendant acting for the purpose of taking this deposition have authority or information [67] with respect to whether the exhibits should be received in evidence in this proceedings, and therefore we cannot stipu-

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

late as to its being received, but merely offered with no objection.

Mr. Lovett: That is agreeable. That is right.

Q. Did you ever have any further correspondence with Mr. White with respect to this matter?

A. I believe that was the last that I had.

Q. You had some previous correspondence with him, did you?

A. Yes, I did. I believe, though, that it was not concerned with "Gaelic," except when he sent me the names of people who wanted copies.

Q. And you have none of those letters?

A. No, I have none of those letters left.

Q. Was there any understanding at all with you, Mrs. Oettinger, and Mr. White with respect to your remitting to him any amount which you received from the sale of copies of "Gaelic"?

A. No, I never sent him a cent.

Q. Were you supposed to, with your arrangement with him?

A. No. No. Money was never discussed in any way.

Q. Do you have the original manuscript which you obtained from Mr. White? [68]

A. No, that was lost.

Q. And when did he give that to you?

A. Well, that was in the spring of 1941.

Q. At the time of your discussion with him?

A. Yes.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. And it was in your possession then for some time, was it?

A. It was in my possession until after we had made the copies in May. We made the copies, I believe, in May. No, June. That was dated June, 1941, the first set that we made.

Q. And that original manuscript that you obtained from him then was in your possession from the time you went to his home with your husband and Ada Wyman? A. Yes.

Q. Until subsequent to June of 1941?

A. That is right.

Q. And you don't know where the original is now?

A. No. Of course, that was a mimeographed copy. It was not the original manuscript. I don't know what form the original manuscript was.

Q. I understand that, but it was the original one that Mr. White gave to you? A. Yes.

Q. Do you have in your possession copies which you made from the original manuscript which was given to you? [69] A. That is right.

Q. And as I understand, you had them at the house where you were moving from?

A. That is correct.

Q. And at this point I believe we can stipulate with counsel for the defendant, Susan Kimmell, that Mrs. Oettinger could bring one in to incorporate into this record?

Mr. Lovett: Yes, I think we better make the

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

same stipulation that it can be offered. Did you plan on offering it in evidence?

Mr. Rhoten: Well, I think we might do that. However, as I understand your instructions, you are not authorized to consent to the receipt of it in evidence?

Mr. Lovett: That is right.

Mr. Rhoten: However, as I understand it, you have no objection to its being introduced? Therefore, we can stipulate that "Plaintiff's Exhibit 2 for Identification," which is the copy of "Gaelic," be offered into evidence here and be produced by Mrs. Oettinger in the next day or so, so as to be incorporated into this record of the deposition.

Mr. Lovett: Yes, that is correct.

(Reporter's note: The mimeographed copy of "Gaelic" was subsequently produced by deponent, Mrs. Oettinger, and was marked for inclusion in this deposition as "Plaintiff's Exhibit 2 for Identification.") [70]

Q. At the time you obtained the copy of the manuscript, or the manuscript as we call it here, from Mr. White, did he also give you some stencils, or mimeograph stencils?

A. No, we cut our own stencils.

Q. And he didn't send you any mimeographed stencils? A. No.

Q. And where did you have these stencils cut and the manuscript reproduced?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

A. Well, Ada Wyman cut about fifty pages or so of the stencils, and I cut the remainder. I think there are one hundred forty-seven pages, I believe, altogether, and I cut the remainder.

Q. And where were they reproduced?

A. In Palo Alto.

Q. In some commercial shop?

A. No, in my home. We mimeographed them ourselves.

Q. You mentioned a few minutes ago, Mrs. Oettinger, that Mr. White said that he had not published the manuscript, I believe in the first discussion which you had with him about it?

A. Yes, and he——

Q. And did you discuss there as to what he meant by "publishing"? A. No.

Q. Did he tell you whether or not he had made copies [71] of the manuscript and given to other people?

A. Yes, he had—I don't know how many he had made when he first had them made, but he said that they had all been given away.

Q. Did he say whether or not he had put the matter in book form?

A. I don't know that he said so in as many words. I certainly understood that he had not.

Q. In other words, you don't know what he meant when he used the word "publish"?

A. No, I don't know what he meant by that.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. And that was not discussed there as to what he meant?

A. As I understand, he said, "I don't know if I will ever publish it." Or something like that.

Q. Did he ask you at any time not to put it in book form?

A. I believe that this—in this last paragraph in this letter he says something like that in the last paragraph there, "as long as it is not published," or——

Q. But that is the only——

A. That is the only thing I remember his ever saying, but, of course, he knew that I was not equipped to publish anything. I mean in book form.

Q. But prior to his letter of May 18, 1945, as far as [72] you can recall, there was no restriction about what you could do? A. No.

Q. With the manuscript?

A. In the discussion that we had about it, I believe that I made some kind of remarks about, "Of course, we will just mimeograph it and distribute it at—or to friends," or something like that. "Give these people that want copies." It wasn't—the whole thing was so informal that it is hard to remember even.

Q. But there was no definite limitation as to whom you could sell or give copies?

A. No, he never did.

Q. Now, with respect to this matter, apparently

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

from information, it had something to do with spiritualist group, is that correct?

A. Well, I don't believe there was an organized group. I never heard of any and they never did any public work. Mrs. White was what is sometimes called "Psychic" or a "sensitive" person, and she received this material which was not—very little of it was personal. It was a system of philosophy.

Q. Did your instructions from Mr. White have to do with limiting the distribution of this material to people who were interested in that particular phase? [73]

A. No, it didn't. It was almost obvious that no one else would want it. I mean unless they had an interest. They didn't have to believe it.

Q. But at no time was there any instruction from Mr. White or any one through him to restrict the distribution of the manuscript to that particular group?

A. No. No. I never belonged to any group, and I don't know that there was ever any group. We didn't have seances or anything like that.

Q. Now, are you able to tell us at this time, Mrs. Oettinger, that Mr. White allowed you the use of the manuscript for the purpose of reproduction and distribution without any claim of copyrights?

A. Yes.

Q. And were there no claims of copyrights by him?

A. No.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. And was there any limitation by him with respect to your distribution or sale? A. No.

Q. Either as to number or to whom the distribution or sale could be made? A. No.

Q. Your answer is "no"?

A. My answer is "no."

Q. Now, those which you did sell, what price did you [74] receive for them?

A. The first ones—the first lot we made, we got \$2 for.

Q. And subsequent to that time?

A. Then after I lent the stencils to Mrs. Duce, they came back, for some reason they had been so badly spoiled or damaged that the next bunch was—the bunch I made after that was very poor and I sold those for \$1.50.

Q. Now, when did you lend your stencils to Mrs. Duce?

A. In 1942, about as close as I could put it.

Q. And where does she live?

A. Berkeley, California.

Q. And do you know how many copies she had reproduced? A. I have no idea.

Q. How many did she send you?

A. She sent me two copies.

Q. Now, with respect to Mrs. Duce, did you contact Mr. White relative to permission to extend the stencils and copies to her?

A. Yes, I did, and I have a letter from him—I forgot that when you asked me if I had any further

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)
correspondence in regard to the manuscript. I had a letter from him saying, "That is just up to you. You do as you like."

Q. And you don't have that letter now?

A. I don't have that letter. [75]

Q. And about when was that that you received that letter from him? A. That was in 1942.

Q. And as you recall there were no restrictions at all relative to giving the stencils or Mrs. Duce's reproducing copies?

A. No. I wrote to him because I felt that it was really his property and asked him—told him that Mrs. Duce wanted to make copies and that I wanted to know if it would be all right to send her the stencils, and he said they were my stencils and if I wanted to lend them to her it would be all right; and I think that must have been in 1943 rather than 1942.

Q. Do you know whether or not there was any restriction placed by Mr. White on the number of copies or to whom distribution might be made by Mrs. Duce? A. I haven't any idea.

Q. You have no knowledge of such restriction?

A. I have no knowledge of anything to do with that at all.

Q. Now, with respect to Ada Wyman, who is she?

A. Well, she is a personal friend of mine.

Q. And where does she live?

A. I don't know whether she is still living in

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Bend. I had a letter from her yesterday from Palo Alto, but she [76] said their furniture was still in Bend, I believe.

Q. And where did she live at the time she went with you and your husband to Mr. White's place?

A. She lived at Palo Alto.

Q. And did she have anything to do with this matter with respect to the reproduction of the "Gaelic"?

A. Yes. She read the copy that I had borrowed of this manuscript and we discussed it, and we both thought that there was some very valuable material in the manuscript and that we would like to have copies. I called up Mr. White on the telephone and asked him if we could obtain further copies, and he said that there were no more copies, and either at that time or in a later conversation on the telephone I asked him if he would have any objection to any copies being made, and he then invited us to come over to his house and discuss the matter.

Q. And this was in 1941 or prior thereto?

A. Yes, it was some time early in 1941.

Q. And did she obtain at that time a copy of the manuscript, or copy of the "Gaelic" from Mr. White other than the one——

A. No, we just had the one copy and now that I think of it, it took us so long to cut those stencils that we may have obtained that permission late in 1940, because I was completely an amateur at cut-

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

ting and it took me forever to cut [77] those stencils.

Q. Did she have any of the stencils, or did she help you with making the stencils?

A. Yes, she did.

Q. And did she obtain the stencils after you had them for the purpose of producing copies herself?

A. No. No, she never had the stencils in her possession.

Q. And did she have copies for distribution or sale?

A. No, I did all of that. She had a copy.

Q. One? A. Yes.

Q. Do you know of any one else that had copies of the "Gaelic" or "Gaelic" besides yourself and Mrs. Duce?

A. Do you mean who had the stencils? Any stencils?

Q. Yes.

A. No. I know of numerous people who had copies of the manuscript.

Q. Prior to your obtaining your copies?

A. Prior to my obtaining it, the only ones I know for sure—the only one I know for sure who had it was this Katherine Benner and Mrs. Wilson in Palo Alto had a copy of it which she had copied from somebody else's copy. It was very incorrect. I don't know where she got it. Those are the only ones I know. [78]

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. As far as you know, yourself and Mrs. Duce were the only ones who had copies for the purpose of making extra copies and distribution or sale?

A. Yes, and she made hers from my stencils, so they were all from the same stencils. Those stencils have been destroyed now, if that is of any interest.

Q. Yes, it might be. When were they destroyed?

A. They were destroyed in 1945, right after I made the last set that I made.

Q. And where were they destroyed?

A. They were destroyed in Portland.

Q. And how many sets of copies did you make in 1945? A. Just one.

Q. Now, Mrs. Oettinger, you know who Sue Kimmell is, do you?

A. I know nothing about her except that she was a friend of Mr. White's.

Q. And did you ever meet her? A. No.

Q. Did you ever have any correspondence from her?

A. Yes, we exchanged letters three or four times.

Q. And beginning in what year, would you recall that you had correspondence from her?

A. Well, I think it must have been in 1944 and '5. I certainly hadn't had more than a letter or two from her [79] before Mr. White died.

Q. And with respect to the "Gaelic" was there any correspondence from her?

A. Yes, I mentioned to her that a friend of mine,

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Barbara Delkin, had told me that Mr. White had decided to publish "Gaelic." That probably he wouldn't want any more copies made.

Q. And you mentioned that in one of your letters to Mrs.— A. To Mrs. Kimmell.

Q. And was that prior to receiving a letter of May 18, 1945, from Mr. White?

A. Yes, it was.

Q. And do you know whether or not that correspondence is the same matter which is referred to in the next to the last paragraph of Mr. White's letter? A. I assumed that it was.

Q. I believe that is all for the plaintiff.

Cross-Interrogatories

By Mr. Lovett:

Q. Mrs. Oettinger, do you know the plaintiff in this case, Harwood A. White? A. No.

Q. You don't know him at all?

A. I just received one letter from him—two letters from him. [80]

Q. You have stated that your acquaintanceship with Mrs. Kimmell was limited to an exchange of letters in 1945? A. That is true.

Q. You have never met her personally?

A. No.

Q. How did you happen to get hold of this manuscript originally, Mrs. Oettinger?

A. I borrowed it from Mrs. Katherine Benner in San Mateo.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. Why did you borrow it from her?

A. Well, I had seen a book that Mr. White had published called "The Betty Book," and I believe I mentioned that book to Mrs. Benner and said that I thought there were some things in there that were really very valuable, and she asked me if I had seen the "Gaelic" manuscript and I said no, and she offered to lend it to me.

Q. She had a copy? A. She had a copy.

Q. Could you tell us briefly, as briefly as you can, what was the subject matter of this "Gaelic" manuscript? What was it concerned with?

A. It purported to be material received from the spirit world and dealt with a philosophy for better living.

Q. Now, you say that you had previously read a book by Mr. White called "The Betty Book"? [81]

A. Yes.

Q. Briefly, what was the subject matter of that book?

A. That was very much the same. It was the first time that they had published anything of these experiments they had been carrying on for something like seventeen years, I believe, and they had said nothing about it because they were, themselves—for many years remained in a very skeptical attitude towards this material that Mrs. White kept getting. Finally they decided that regardless of its source it contained some very valuable philosophy and they would publish it at the risk of ridicule.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. And who was this that would publish it?

A. Mr. and Mrs. White. See, "Betty" was Mrs. White.

Q. Am I correct in understanding that the material in both of these documents, "The Betty Book" and the "Old Gaelic," was communications received by Mrs. White, and that Mr. White had merely recorded them and written them up in book form. is that correct?

A. I believe that some of the material in "Gaelic" was received by other persons besides Mrs. White. I believe that there is one passage that Mr. White received himself, although he was always very deprecatory about any ability that he had along that line.

Q. Your interest in these two books was in the philosophy of life that was represented by those books? [82]

A. That is true, that is true.

Q. Then after this copy of the manuscript had been loaned to you by Mrs. Benner, you read the manuscript?

A. Yes.

Q. And was it then that you became interested in reproducing it? After you had read it?

A. Yes, at first I had only hoped to obtain a copy for my own possession from Mr. White, and my friend, Ada Wyman, who read it while I had it also thought it contained some very valuable material and she wanted a copy, too, and when Mr. White had no—we found Mr. White had no more copies, we asked if he would object to our making some copies.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. It was then that you had this discussion in the spring of 1941, or thereabouts?

A. Yes, either late 1940 or early 1941, I think it must have been while it was still cold. We sat in front of the fire.

Q. And what was your purpose in reproducing copies of the "Old Gaelic"?

A. I am afraid I had kind of a missionary spirit in the matter. I thought it was too good for a lot of people to miss.

Q. To whom did you wish to distribute copies after you had made them?

A. Well, Mr. White said that he had received requests [83] from some of his friends where people saw it in some one's possession, and they read it and they wanted a copy for themselves, and that is the way that I got all of the contacts that I had for sending out these copies was indirectly through some one who saw somebody else's copy and wanted a copy, and said, "Where can I get it," and then eventually they came to me either through—sometimes through Mr. White and sometimes through Mrs. Kimmell, and sometimes I got letters from people who had seen a copy, I don't know where. One had seen one in the dentist's office.

Q. Were most of the people to whom you intended to distribute copies persons that were acquainted with the writings of Mr. White, or with people that were associated with Mr. White, or with

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

people that were associated with Mr. White in the work that he was doing at that time?

A. None of them as far as I know were associated in the work. I never did know who formed the group who were apparently present when "Gaelic" was received. I mean when the material was communicated. I think there were several people present because it mentions that different ones in the group would ask questions which would be answered, but I never did know who those people were, and I never knew any one who was associated with him in that actual work at all. But Katherine Benner wanted another copy, and I wanted some copies so that I could lend them, and when we first started, I didn't have any list of people that I was going to give [84] them to. It is just sort of—I still get letters about every three, four or five months. Somebody has seen a copy and heard that I had them.

Q. But originally most of the requests for copies came through Mr. White or Mrs. Benner?

A. That is right.

Q. Or Mrs. Kimmell? A. That is right.

Q. Or some of the people that knew Mr. White and knew of the work that he had been doing?

A. That is right. You see they knew him personally. I didn't know him personally until this matter came up.

Q. Then I understand you cut these stencils in late 1940 or early 1941? A. That is right.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. And you had them in your possession through 1945, at which time you destroyed them?

A. That is right.

Q. Except for a period in—you didn't say what date.

A. I think it must have been in 1943.

Q. When Mrs. Wyman——?

A. No, Mrs. Duce.

Q. Mrs. Duce borrowed them from you?

A. Yes.

Q. That is correct. Why were the copies of the [85] stencils destroyed in 1945?

A. They had become very badly damaged. There is a certain routine to caring for stencils to preserve them, and that routine had not been observed and the stencils had been so badly damaged, and I wasn't able to make really presentable copies the last time I did it. I cleared them up some, but some of the pages were barely legible, and I just decided it wasn't worth while bothering with.

Q. And you never made any additional stencils after those original ones were destroyed?

A. No. No.

Q. Those were the only ones you had?

A. Yes, I cut one page that was so badly ruined I couldn't use it at all. I cut it over.

Q. But other than that you didn't produce any stencils of the original manuscript after that time?

A. No.

Q. And you have none now? A. No.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. Then you said that you had seen Mr. White a total of two times? A. Yes.

Q. The original time was when you went there to discuss the possibility of making copies of the manuscript? A. Yes. [86]

Q. And then again, I believe you said, in 1942?

A. Yes, that was about the time.

Q. What was the occasion of your second visit to see Mr. White?

A. Well, I just wanted to discuss with him if Betty had ever offered any explanation of certain spiritual phenomena that had nothing whatever to do with the manuscript.

Q. I see. You didn't discuss anything about the reproduction or the distribution or anything in connection?

A. As far as I know it was never mentioned, except as I was leaving, I said, "By the way, in 'Gaelic' it appears that you might have received some of the communications yourself." And he said, "I believe there was one time." He said, "I never was any good at that sort of thing," or something like that; and that was just as I was going out of the door.

Q. And then other than letters you never had any personal contact? A. No. No.

Q. With him?

A. No. Mr. White was a writer and had had experience with publishing and copyrights and so

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

on. It certainly wasn't through ignorance that he was so free with this business.

Q. Am I correct in understanding that you made a total of two sets? [87]

A. No, I made three.

Q. You made three sets of copies altogether?

A. Yes.

Q. Now, as nearly as you can remember what was the total number of copies that you made altogether in the three sets?

A. Oh, Ada Wyman and I have different impressions about the first set that we made.

Q. What is your personal recollection?

A. My recollection was that we made thirty or forty copies. She thinks——

Q. The first time?

A. Yes.

Q. The second?

A. I think I made forty the second time.

Q. And the third?

A. And I think I made forty the third time.

Q. So altogether, according to your recollection it would be a total of one hundred twenty? Roughly forty in each of the three batches?

A. Yes.

Q. And I believe you sold the first batch for \$2, is that correct?

A. Yes.

Q. How much did it cost you to reproduce these copies? [88]

A. I never kept any books on it. With the copies I also furnished a binder and——

Q. Would you say that the \$2 which you charged

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

was in excess of what it cost you to reproduce the manuscript?

A. It was somewhat in excess of materials. Certainly not anything like compensation for the time we put in.

Q. And would that also be true of the second and third sets of copies you made? A. Yes.

Q. Those were sold for \$1.50 each?

A. Yes, I think I sold—the third one was sold for \$1.50. I think the second one was sold for \$2. I didn't think it was quite as good a job of mimeographing, but everything had gone up by that time so I still charged \$2 for those. Ada Wyman had had experience in mimeographing more than I, and she did most of the mimeographing on the first set, and it was done better than I did it.

Q. Then after the copies were made, did you keep them personally yourself? A. Yes.

Q. And you made distribution yourself of all of the copies? A. Yes.

Q. Mrs. Wyman didn't make any distribution?

A. She didn't make any at all. [89]

Q. To whom did you make distribution as nearly as you can remember of these various copies that you received?

A. I don't have a complete list. I have a list barely complete of the first set.

Q. Would you sell them to any one that would ask for a copy? A. Why, sure.

Q. And would pay the \$2? Did you place any

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

copies in the public libraries in California, or any place? A. No. No.

Q. Or anywhere else? A. No.

Q. In other words, you personally retained all the copies? A. Yes.

Q. And disposed of them yourself?

A. Yes, I have never disposed of all of the last set, and I think I am in the hole on that one.

Q. You still have some available from the last set?

A. I still have some, and I offered to destroy them when I wrote to Mr. Harwood White, and he said that wouldn't be necessary; that I could do whatever I wanted to with them.

Q. Did you either personally or through your friends know all of the people that asked you for copies?

A. No. I had letters from people mostly around Los [90] Angeles that I never heard of before, but they had seen a copy somewhere and heard that I had them and I sent them a copy.

Q. You have no personal knowledge whether these people then were particularly interested in the spiritual or philosophical work that was represented in these?

A. Well, they nearly always mentioned in their letters that they had seen it and that they felt it was very valuable material and that they would like to own a copy, and sometimes they were very enthusiastic about the material.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. You were not engaged in the bookstore business or lending library business yourself at any time during this period? A. No. No, never.

Q. I believe you stated—now you correct me if I am not right, that you wrote Mr. White and asked him if it would be all right with him to let Mrs. Duce have the stencils? A. Yes, I did.

Q. To make some copies. Why did you write Mr. White for permission to do that?

A. Well, I felt that essentially the manuscript was his property and that he had allowed me to make the stencils and while I had no reason to suppose that I was—would be particularly favored in that regard, still I thought that maybe I should ask him if it was all right for me to let Mrs. [91] Duce have them.

Q. Now, I also seem to recall that somewhere in your testimony you mentioned the fact that Mr. White didn't want the manuscript reproduced or published in book form?

A. No, I don't know that he didn't want it. He just mentioned in the beginning that at that time he had no plans for publishing it in book form. The other books that he published were a little more on the popular vein than this manuscript was.

Q. He stated that? That was in the conversation that you and Mrs. Wyman and your husband had?

A. Yes.

Q. That was the first time you went to visit him?

A. Yes.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. And he stated then he had no present plans for publishing this manuscript in book form?

A. Yes.

Q. But he had no objection to your reproducing it by mimeograph? A. That is right.

Q. I think that is all.

Redirect Interrogatories

By Mr. Rhoten:

Q. Mrs. Oettinger, with respect to your correspondence with Mr. White, at no time did he restrict you with respect to whom you could give the manuscript or copies, or even the [92] stencils of it.

A. No, as far as I know I could have lent the stencils to any one as far as any agreement I had ever made with him.

Q. There was no restriction whatever in that regard? A. No restriction whatever.

Q. Was there any restriction whatever, at all, at any time with respect to whom you could give copies or sell copies of the manuscript? A. No.

Q. Now, with respect to the last conversation which you had with Mr. White, as I recall your testimony, was that he told you that only one passage in "Gaelic" was his communication?

A. Now, I couldn't swear that he only said one. He said—as an indirect quotation I would say that he said there was very little indeed that he got himself.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. Do you recall whether or not he told you from whom the communications had come? Or to whom?

A. They came to Mrs. White I think. If I recall correctly there is one place in the manuscript where it says something about another "station." A "station" is a person who is receiving communications, and so that would imply that there was someone else there besides Mrs. White who was receiving communications.

Q. Did Mr. White ever tell you that Mrs. White received [93] substantially all of the communications?

A. Yes. Yes.

Q. He told you that at your second meeting, or the first?

A. Both times, I believe.

Q. In other words, substantially all the material in "Gaelic" then is through Mrs. White?

A. Yes.

Q. I believe that is all.

The foregoing has been read by me and is a correct transcript of my deposition herein.

/s/ MARGARET OETTINGER,
Deponent.

The Court: You have talked about some exhibits attached to the deposition. Those should be detached and given numbers.

Mr. Mullen: Your Honor, the first exhibit attached to that deposition has been heretofore identified and admitted as No. 3.

The Court: All right. Are there any other exhibits attached to the deposition?

Mr. Mullen: Yes, I believe there is a manuscript, a blue-covered manuscript, entitled, on the flyleaf, "The 'Gaelic' Manuscript, reproduced by permission of Stewart Edward White," and on the inside cover bearing the handwritten signature of [94] "Margaret Oettinger," and on the outside cover marked "Plaintiff's Exhibit 2 for Identification."

We offer this as the second exhibit to the Oettinger deposition.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 5 and received in evidence.)

Mr. Mullen: At this time, your Honor, I have in hand the deposition of one Harriet W. Jones that was taken in Santa Barbara, with Mr. Kimmell appearing on the part of his client, and myself on the part of the plaintiff in this action.

Unfortunately, this deposition has not been signed by the deponent. However, Mr. Kimmell is willing to stipulate it may be received unsigned with the same force and effect as though written, signed, and corrected by the witness.

Is that correct, Mr. Kimmell?

Mr. Kimmell: I so stipulate.

Mr. Mullen: We ask that be received under the same stipulation, your Honor, as the Oettinger deposition, and received.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(The said deposition of Harriet W. Jones was marked [95] Plaintiff's Exhibit No. 6 and received in evidence, and is in words and figures as follows:)

PLAINTIFF'S EXHIBIT No. 6

Deposition of Harriet W. Jones, produced as a witness on behalf of plaintiff, taken before Dudley L. Hossack, a Notary Public in and for the County of Santa Barbara, State of California, at the offices of Schauer, Ryon & McMahon, 26 East Carrillo Street, Santa Barbara, California, on Friday, October 27, 1950, at the hour of 11:00 o'clock a.m., pursuant to stipulation.

Appearances:

SCHAUER, RYON & McMAHON, By
ROBERT W. McINTYRE, ESQ., and
THOMAS M. MULLEN, ESQ.,
For plaintiff.

LESLIE F. KIMMELL, ESQ.,
For defendants.

Plaintiff's Exhibit No. 6—(Continued)

HARRIET W. JONES

produced as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McIntyre:

Q. Mrs. Jones, would you state your name, please? A. Harriet W. Jones.

Q. Now, were you acquainted with Stewart Edward White during his lifetime? A. I was.

Q. How long did you know him?

A. All my life. [96]

Q. Now, directing your attention to the period—are you familiar with a manuscript which Stewart Edward White had, which he caused to be written up and which he called the “Gaelic” manuscript or the “Old Gaelic” manuscript? A. Yes, I am.

Q. Now, I show you a document here—or a volume, and ask you if you would look at it and state whether or not that is a copy of the “Gaelic” or “Old Gaelic” manuscript

(Exhibiting document to the witness).

A. Yes, it is.

Mr. Kimmell: Is it anticipated that that document will be introduced?

Mr. McIntyre: At the trial. I think it would be better at the trial or it may be stipulated that the document will be—we might have it identified, if you would like.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

Mr. Kimmell: Possibly it would be wise to.

Mr. McIntyre: It will be identified, but it will be admitted at the trial.

Q. Have you read this manuscript?

A. Yes.

Mr. Kimmell: Mr. McIntyre, shall we identify it now?

Mr. McIntyre: I guess it would be a good idea. We will offer this for purposes of identification—this manuscript—which has on its face the name of Roderick Juan White and is entitled the “Gaelic mss.,” and the fly-leaf is inscribed [97] “Gaelic manuscript, reproduced by permission of Stewart Edward White.” We will offer it for identification at this time as Plaintiff's Exhibit 1.

(The document was thereupon marked
“Plaintiff's Exhibit No. 1 for identification to
the deposition of Harriet W. Jones.”)

Q. Now, directing your attention, Mrs. Jones, to the period of around '40 or '41—the year of 1940-1941, did you have occasion to have a discussion with Mr. Stewart Edward White relative to this “Old Gaelic” manuscript? A. Yes, I did.

Q. Will you state generally the gist of that conversation. Can you state approximately when that occurred?

A. Well, not exactly. It was '40 or '41—around in that general time.

Q. Where did this discussion take place?

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Harriet W. Jones.)

A. At his home.

Q. And who was present?

A. Just the two of us.

Q. Would you state generally the gist of the conversation.

A. It was merely the discussion of a mutual friend of ours, Mrs. Oettinger, who had asked permission to use this material and put it in this shape in order to sell it and pass it about, and that he had given her permission. [98]

Q. He stated that to you? A. Yes.

Q. Is that the substance of the conversation?

A. Well, just that he seemed pleased that it was being done. I don't remember the details of the conversation.

Mr. Kimmell: I move to strike out "he seemed pleased." I don't know that that is germane.

Mr. McIntyre: I will make further inquiry as to that.

Q. Did he say that he was pleased that she was doing this? A. Yes, I am sure that he did.

Q. Now, you are acquainted with a Mrs. Margaret Oettinger or Oettinger? How do you pronounce that? A. Oettinger, I think.

Q. Oettinger. A. Yes.

Q. Did you have occasion to obtain any copies of this manuscript from her? A. Yes, I did.

Q. Will you relate what occurred in that respect.

A. Well, I knew her and she had told me the circumstances, and that she had the books, and I

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

asked her even before they were finished if she would send me one as soon as they were ready, which she did, by mail, and I sent her the money [99] for it.

Q. Approximately how much did you pay for it?

A. I am almost positive it was \$2.

Q. Did you ever obtain any further copies?

A. Yes. Subsequently members of my family wanted copies, so I wrote and got extra ones.

Q. How many?

A. Well, two, to my knowledge.

Q. And what did you pay for those?

A. \$2.

Q. You paid \$2 apiece? A. Yes.

Q. To Mrs. Oettinger?

A. Yes, I know positively I paid \$2 for the later ones.

Q. Approximately what was the date or about what period of time did this occur?

A. I don't know. The first one, I know, is when they were first printed, because I waited for it.

Q. Do you recall when that was—in what year?

A. Well, I would say '40 or '41, just generally.

Q. Have you a general idea of the date or the time? A. No, I am sorry.

Q. Well, how close could you put it?

A. You mean the month or the year?

Q. No, no. The year that you got the second two, or the approximate year. [100]

A. The second two. Well, it could have been some years later.

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Harriet W. Jones.)

Q. One, two or three?

A. It could have been three.

Q. Do you think it was prior to 1945 that you received them? A. I really couldn't say.

Q. But it was before Stewart Edward White's death, however? A. Oh, yes, before.

Q. Do you recall the date of Stewart Edward White's death, approximately.

A. I am sorry. I have got a horrible memory.

Q. What did you do with these volumes you received?

A. I sent them to the people who had asked for them.

Q. Now, how did you obtain these from Mrs. Oettinger? What medium did you use?

A. I wrote her a letter and asked her for several more copies, and sent her the check in the letter.

Q. When you received the copies—all three of them—at any time when you received copies of this manuscript from Mrs. Oettinger, was any restriction placed on the use you could make of them?

A. No.

Q. Was anything said about any [101] restriction? A. Nothing.

Q. Or limitation? A. No.

Mr. McIntyre: I think that is all, Mr. Kimmell. You may cross-examine.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

Cross-Examination

By Mr. Kimmell:

Q. Mrs. Jones, was Mrs. Oettinger in the business of retailing books, do you know?

A. Not that I know of, other than this particular book.

Q. She wasn't in the book retail business?

A. Not to my knowledge.

Q. How long have you known Mrs. Oettinger?

A. I had known her casually for about a year, I would say.

Q. You would not say that you know her well?

A. Not intimately.

Q. Do you know her well enough to know whether or not at the time you got these books from her she was in any kind of business, particularly the book retail business? A. No.

Q. Referring to your conversation with Mr. White, just what was brought out in that conversation, so far as Mrs. Oettinger's connection with this book was concerned—this manuscript? [102]

A. Well, he knew that I was interested in the manuscript, and he also knew that I was a friend of Mrs. Oettinger's, so it was a perfectly natural conversation in connection with the two, and that she had come and asked if she might do it, and that he had allowed her to do it.

Q. Mr. White had allowed her to make copies of the manuscript? A. Yes.

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Harriet W. Jones.)

Q. Did he indicate how many copies?

A. No, I don't remember that there was anything said about the number.

Q. Was there anything said in that conversation with Mr. White as to the persons or type of persons that the manuscript should be given to?

A. No, never.

Q. Who fixed the price of \$2 a copy for the copies of the manuscript in question?

A. I have no idea.

Q. Well, who told you that the price would be \$2 per copy?

A. Well, it must have been Mrs. Oettinger. My understanding was that that would be an adequate amount to make the book possible.

Q. Now, just what do you mean by an adequate amount to make the manuscript possible? [103]

A. That is a mere supposition on my part. I don't remember that there was any discussion with Mrs. Oettinger about why or how much, except that I knew the amount and paid it.

Q. Can you tell me how you knew the amount?

A. Because she told me.

Q. She told you. Did she indicate what the \$2 was for? Was that the retail price or the cost of producing the manuscript or just what was it?

A. I don't know. She simply told me it was \$2, and I sent her \$2. I don't remember any conversation as to the details of that at all.

Q. Mrs. Jones, had you ever known of this manu-

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Harriet W. Jones.)

script or copies of the manuscript being available to the general public in any retail book store?

A. No.

Q. Have you ever known of the manuscript or copies of it being available to the general public in a public library? A. No.

Q. Do you know that the manuscript or a copy of it had been available to the general public in any other matter out of either retail book stores or public libraries?

A. Yes. By free circulation among all the people who owned copies.

Q. How many people owned copies? [104]

A. I couldn't say. I would say five or six, that I know of, who have had them over the years. I know my own family and my brother-in-law and my nephew, and I am sure some people here in Santa Barbara. I mean, I am just supposing, but I take it for granted they naturally would, because they were all eager for it and waiting for it.

Q. I think you ought to confine your answer to what you actually know.

A. All right. I am sorry.

Q. You actually know that five or six individuals have had copies of this manuscript? A. Yes.

Q. And beyond that you have no knowledge?

A. No.

Mr. Kimmell: I think that is all.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

Redirect Examination

By Mr. McIntyre:

Q. Among those five or six people, one of them was Mr. Stewart Edward White, was it not?

A. Who had a copy?

Q. Yes. A. Oh, certainly.

Q. He had a number of copies, did he not?

A. Yes, he did.

Q. And circulated them to anybody who wished to borrow [105] them and read them?

A. Yes.

Mr. McIntyre: That is all.

Recross-Examination

By Mr. Kimmell:

Q. How do you know that Stewart Edward White circulated copies among other people—his friends or acquaintances?

A. That is a question that I cannot answer by saying I saw him do it, but I just know that he did, because we discussed the fact that people were anxious to read it and that he had loaned it to them. I don't know specific people that he handed it to.

Mr. Kimmell: I think that is all.

Mr. McIntyre: That is all.

Mr. Mullen: As an exhibit to the deposition of Harriet W. Jones there is a further manuscript

which is marked on the cover "Plaintiff's Exhibit No. 1 for Identification, to the deposition of Harriet W. Jones," and signed by "Dudley L. Hossack, Notary Public."

We will at this time offer that exhibit in evidence.

The Court: It may be received.

The Clerk: **Plaintiff's Exhibit 7 in evidence.**

(The document referred to was marked Plaintiff's Exhibit No. 7 and received in [106] evidence.)

Mr. Mullen: At this point, your Honor, the plaintiff rests.

The Court: So long as I have this material to look over, we will take a recess until 2:00 o'clock, at which time we will continue and hear the evidence on the part of the defendant. By that time I will have completed the reading of the depositions.

(Whereupon, at 12:00 o'clock, noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [107]

Wednesday, November 29, 1950. 2:00 P.M.

The Court: Gentlemen, the record will show that since the morning session I have read the deposition of Mrs. Margaret Oettinger and the deposition of Mrs. Harriet W. Jones, and the exhibits which were introduced in conjunction with them.

Mr. Kimmell, put on your proof.

You had rested, Mr. Mullen?

Mr. Mullen: I had rested.

Mr. Kimmell: Mrs. Susan Kimmell.

SUSAN CRANDALL KIMMELL

called as a witness in her own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Susan Crandall Kimmell.

Direct Examination

By Mr. Kimmell:

Q. Where do you live, Mrs. Kimmell?

A. Laguna Beach, California.

Q. You have a business or occupation?

A. I am a housewife and a part-time book reviewer and literary agent.

Q. How long have you been a literary agent?

A. The past two years. [108]

Q. How long a book reviewer?

A. Since 1934.

Q. You knew Stewart Edward White during his lifetime? A. I did.

Q. He died when? A. September 18, 1946.

Q. How long did you know him prior to the date of his death?

A. Beginning with the summer of 1937 I corresponded with him, correspondence which continued for the rest of his life.

In the summer of 1940 I first met him, when he came to visit us at Laguna Beach.

Q. You kept up a personal contact with him subsequent to that date? A. Yes, I did.

Q. He visited in your home in Laguna Beach several times? A. Yes, he did.

(Testimony of Susan Crandall Kimmell.)

Q. You and members of your family visited him in his home in Burlingame, California?

A. Yes, we did.

Q. You had a common interest with Stewart Edward White in the general subject of metaphysics?

A. Yes, sir. [109]

Q. Did you work with or assist Mr. White in any way in his metaphysical activities?

A. Yes, I did.

Q. What did you do?

A. On the occasions when I visited him I talked with him a great deal about his plans for his books or, rather, he talked with me.

He liked to discuss the ideas he had in mind and get suggestions as to material that might be incorporated.

After writing a rough draft he would bring it in to read to me, and we would discuss it, and I, being naturally less experienced than he, could sometimes give him a point of view of the more or less novice.

Then in connection with one of his books in particular, "The Stars Are Still There," he had had a great deal of—I did some work. He had had a great deal of correspondence, following particularly the publication of "The Unobstructed Universe."

Many people wrote him from all over the country asking him questions about his philosophy and views on his personal attitude of living. It occurred to us it might be interesting to found a book or base a book on that material.

I took some hundred carbon copies of his replies

(Testimony of Susan Crandall Kimmell.)

and classified them according to the type of question that had been asked. It turned out to be about 83 different [110] categories of questions that people had asked him on all sorts of subjects pertaining to, one might say, the technique of living.

I indexed those and classified them. He wrote the book, "The Stars Are Still There," based on that material, on his replies to previous correspondence, and elaborating on the questions that were most generally asked. I helped.

Then I made indexes for his later books. I worked quite extensively on "Anchors to Windward."

We carried on a sort of, as he called it, guinea-pig test. I took copies of the manuscript down to Laguna Beach with me and showed them to about thirty of my friends, getting their comments and questions.

We then went over the manuscript page by page, according to those comments, some of which he incorporated into the material and some of which he, of course, ignored.

Q. For how long a period had Stewart Edward White been a student of this general subject of metaphysics, to your knowledge?

A. I believe from about the year 1917. His wife, Betty White, was also a student of that subject. Harwood has already said that it was through Betty White's experiences that Stewart White became interested. He has often told me how skeptical he was of all this sort of thing until it was proven beyond his ability to withstand it. [111]

(Testimony of Susan Crandall Kimmell.)

Q. You have been a student of this general subject, also? A. For the past 20 years.

Q. Can you list the number of books on metaphysical subjects which Stewart Edward White has written?

A. There were 10 all together: "Credo," "Why Be a Mud Turtle?" "The Betty Book," "The Unobstructed Universe," "Across the Unknown," "The Road I Know," "Anchors to Windward," "The Stars Are Still There," "With Folded Wings," "The Job of Living."

Q. Can you tell the court briefly what is your impression of what this philosophy of teaching of Stewart Edward White was?

A. It was based on a belief in the continuity of consciousness. Not in the sense that the spiritualists use it, in a more or less possibly superstitious way. It might be considered as an analogy to the tenets of the physicists, who have proved the indestructibility of matter.

Stewart White believed there was an analogy in that and the human spirit. The human spirit was likewise indestructible. Therefore, his teachings were based on that attitude, with the belief that immortality is right here and now and it behooves us to live accordingly.

Q. Would you say that in general his beliefs were the same as Eileen Garrett's, the publisher and editor of "Tomorrow" [112] magazine, and of other well-known and respected students in that field?

A. Yes, I would.

(Testimony of Susan Crandall Kimmell.)

Q. You know Eileen Garrett personally?

A. I know her intimately.

Q. You have discussed Stewart Edward White's work with her?

A. Yes, I have. I met Eileen Garrett through Stewart Edward White.

Mr. Mullen: I believe I would have to object to that as hearsay.

The Court: It is merely a little background. You should not go into the matter further. I am not interested in the validity of the person's beliefs. I do not think they are involved in this case.

The main question here is the right of ownership of particular property or whether it is in the public domain.

Mr. Kimmell: I don't want to encumber the record with material that is not germane, but I thought it might be of interest as background.

The Court: All I am interested in is the validity of the matter.

Q. (By Mr. Kimmell): Do you know the source from which "The Gaelic Manuscript" came?

A. I believe that the statement that Harwood White made [113] this morning covers that very adequately, so far as I have been informed by Stewart White, that it was received by him through so-called "invisible" or "discarnate" entities.

Q. Will you state when, where, how, and under what circumstances you first saw a copy of "The Gaelic Manuscript"?

A. I first saw fragments of "The Gaelic Manu-

(Testimony of Susan Crandall Kimmell.)

script" which Stewart White sent to me in reply to some questions I had asked him. He sent me several mimeographed pages.

Then later—that was in the summer, I believe, of 1940. Then later that fall he sent me a blue-bound copy of the mimeographed "Gaelic" material. This was alone, and he told me I must be sure to return it.

Mr. Kimmell: Your Honor, attached to the deposition of either Don Stevens or Mrs. Terry Duce is a copy of this manuscript.

The Court: We already have two copies. Where is the third one?

They look, on examination, to be the same. They begin the same way, anyway. The pages are different, because of the manner of binding.

Mr. Kimmell: This is the deposition of Don Stevens, that I have just had opened.

Your Honor, will you handle this in any way you please? I want to identify that as the copy which she first received.

The Court: This has an index. I think it begins the [114] same way. We will take this manuscript, which is marked as Exhibit A for identification to the deposition of Stevens——

Mr. Kimmell: For the record, may we read what appears on the blue page, just inside of the manila cover?

Mr. Mullen: Might I examine that before it is read?

Mr. Kimmell: Yes. It is just a stamp. It says,

(Testimony of Susan Crandall Kimmell.)

“Return to Stewart Edward White, Burlingame, Cal.”

Q. (By Mr. Kimmell): You don't recognize the writing there, to say——

A. Yes, I would. His writing was very characteristic.

Q. You think that is his “Return to” above the name?

A. Yes. And this “#26” which shows it was No. 26 among the copies he had made.

The Court: Go ahead from there.

Mr. Mullen: I move to strike the observation that the number “26” meant it was the No. 26 copy that he had made.

The Court: That may be stricken, yes. The number is there. It says “#26.”

Mr. Mullen: Unless he told you that. Did he ever tell you that, Mrs. Kimmell?

The Court: Let's not go into that. You can ask that later. I am striking it. Later you may bring that out.

Q. (By Mr. Kimmell): The manuscript you have in your hand is the first manuscript which you received from Stewart Edward White? [115]

A. Yes, it is.

Q. About what date was that?

A. The fall of 1940.

Q. Did he give you or loan it to you at that time?

A. He loaned it to me.

Q. Did he later give you the manuscript?

A. He later gave it to me, when he permitted

(Testimony of Susan Crandall Kimmell.)

Mrs. Oettinger to make other copies, so that he had more copies.

Q. Do you know Mrs. Margaret Oettinger?

A. I have never met her. I have had brief correspondence with her.

Q. She is also known sometimes as Mrs. Frank Oettinger?

A. I believe so.

Q. Did you ever receive a letter from Stewart Edward White in which he referred to Mrs. Oettinger's making or having made copies of this manuscript?

A. Yes, I did.

Q. I show you a letter bearing in the upper left-hand corner the words "Stewart Edward White," and in the upper right-hand corner the words "Little Hill, Burlingame, Cal.," and bearing the date "November 18, 1940."

I will ask you if you ever saw this paper with the typewriting on it before.

A. Yes, this came to me.

Q. In your correspondence with Mr. White, how did he [116] sometimes sign his name?

A. Usually just "SEW."

Q. That bears the signature "SEW"?

A. It does.

Q. Do you recognize the handwriting?

A. I do.

Q. Whose handwriting is it?

A. Stewart Edward White's.

Q. Will you read the pertinent parts of that letter?

(Testimony of Susan Crandall Kimmell.)

Mr. Mullen: Before you do that, I would like to examine it, if I may, Mr. Kimmell.

Mr. Kimmell: I am sorry, Mr. Mullen.

Mr. Mullen: I have no objection to that being offered in evidence, Mr. Kimmell. I believe the letter is the best evidence of its contents.

The Court: He is not asking her to read it to me. I can read it. She does not have to read it.

If you wish to ask questions based on it, all right.

The Witness: Just the first paragraph is pertinent, your Honor.

The Court: That is all right. Go ahead.

Q. (By Mr. Kimmell): Does that letter set forth any limitation with reference to the distribution of this manuscript in question?

A. It says—— [117]

Mr. Mullen: I object to the question on the ground that the letter is the best evidence of its contents.

The Court: What is the question?

Mr. Kimmell: Does the letter set forth any limitation on the distribution——

The Court: That is asking her to interpret the letter. The objection will be sustained. I will have to interpret it, as to what it says.

Mr. Kimmell: I will offer the letter in evidence. I have a photostatic copy.

The Court: It may be received.

The Clerk: Defendant's Exhibit A in evidence.

(The document referred to was marked Defendant's Exhibit A and received in evidence.)

(Testimony of Susan Crandall Kimmell.)

The Court: She probably will want to keep it.

Mr. Kimmell: I have a photostatic copy.

The Court: It may be received in lieu of the original. It is clearer.

The Witness: Yes, it is.

The Court: It is clearer than the original.

Mr. Kimmell: Here is a copy for you, Mr. Mullen.

Mr. Mullen: Thank you very much, Mr. Kimmell. I appreciate that.

Q. (By Mr. Kimmell): One more thing in connection with that letter. Mrs. Kimmell, referring to this letter, does it [118] carry any stenographer's identifying symbol? A. No, it does not.

Q. Did you ever discuss with Stewart Edward White the arrangements which he made with Mrs. Oettinger?

A. Yes, I did, the next time I saw him after this letter.

Q. What did he say with reference to any limitations?

Mr. Mullen: Might we have a foundation, Mr. Kimmell, as to time, place, and persons present?

Q. (By Mr. Kimmell): When did this occur and where was it and who were present?

A. I was there alone. I couldn't give you the exact date. It was the spring of 1941, if I am not mistaken, when I next visited him.

Q. What did Mr. White say? Did Stewart White say anything with reference to limitations?

A. He said that Mrs. Oettinger was making these

(Testimony of Susan Crandall Kimmell.)

copies. She had been introduced to him by a mutual friend, Katherine Benner, of San Mateo. He felt her to be a woman of discretion and he could trust her not to broadcast the copies generally, but to use care as to the people to whom she gave them.

Q. Do you know Mrs. Terry Duce?

A. Yes, I do.

Mr. Kimmell: May I withdraw that question, your Honor, for the time being? [119]

Q. (By Mr. Kimmell): When did Stewart Edward White give you this manuscript, introduced in evidence?

A. It was following the letter which has been introduced, which gave—in which he told me he had given Mrs. Oettinger permission to have copies made of the “Gaelic” material.

He said that I might then keep the copy he had given me, because there would be more made by mimeograph.

Q. When he gave you the copy, did he put any limitations on the use of it by you?

A. Very definitely.

Q. What were those limitations?

A. He told me that this was not to be published, that he wanted it guarded very carefully and shown only to people who were particularly interested in the subject and in whose discretion—or, whose discretion could be relied on, who would not copy any portions of it or produce any portions for publication.

Q. Did you ever procure any of the copies which

(Testimony of Susan Crandall Kimmell.)

were made by Mrs. Oettinger? A. Yes, I did.

Q. How many?

A. Three or four, for friends of mine who wanted copies of "Gaelic."

Q. What instructions did you give them when you [120] delivered the copies to them?

A. I passed on the instructions that Stewart White had given me, and I was very careful not to show these copies to anyone who I felt would not carry out the limitations imposed on me and therefore indirectly upon them.

I told them it must, under no conditions, be reproduced in any form, and only shown to definitely interested people who appreciated the material in it.

Mr. Mullen: I would like to move to strike the answer of the witness, first, upon the ground it is hearsay, and, secondly, on the ground it is a self-serving declaration.

The Court: That is the only way we can do it. Everything is hearsay here. Mr. Harwood White's testimony contained what his brother told him. Mrs. Oettinger in her deposition testified as to what instructions were given her.

Mr. Mullen: Very well, your Honor.

The Court: Ultimately, all is hearsay here. The poor man is dead. If he were here there would not be any lawsuit.

Mr. Mullen: I think that is correct, your Honor.

The Court: The objection is overruled.

Q. (By Mr. Kimmell): Was anything in the way of money collected from the people to whom you

(Testimony of Susan Crandall Kimmell.)

delivered these copies which you secured from Mrs. Oettinger?

A. Yes. These people each paid \$2.00, which was to cover merely the cost of material in the mimeographing. [121]

Q. Do you know Mrs. Terry Duce?

The Court: Did you turn that money over to Mrs. Oettinger or did you pay for the copies when you bought them?

The Witness: I didn't do either. I gave them Mrs. Oettinger's name and wrote her they were reliable people, and the transactions took place between them.

The Court: They were in the "movement," were they?

The Witness: Yes, that is right.

The Court: You know that expression?

The Witness: Yes, I do.

Q. (By Mr. Kimmell): Did Stewart Edward White ever discuss with you any arrangement which he had made with Mrs. Duce or any permission he had given to Mrs. Duce with reference to this "Gaelic Manuscript"?

A. I was present when the arrangement was made.

Q. What was the arrangement made and where, and when was it made, and who were present?

A. It was at Stewart White's home in Little Hill, Burlingame. Those present were Mrs. Duce, her daughter, Charmaine, and Don Stevens, a friend

(Testimony of Susan Crandall Kimmell.)
of Mrs. Duce, and myself, and Stewart White, of course.

Q. What was the arrangement which was made?

A. Exactly the same that was made with—I understand was made with Mrs. Oettinger. He told Mrs. Duce she might make some copies if she took extreme care as to the people [122] who received them. He charged her that this was not published, was not to be published, and must be protected. She agreed to do so.

Q. Did Stewart Edward White ever give you a bill of sale covering the “Gaelic” and other manuscripts? A. He did.

Q. He did? A. Yes.

Mr. Kimmell: Your Honor, through an inadvertence I left the original of this bill of sale in my office. I have photostatic copies, though.

The Court: I presume counsel, subject to any corrections, will stipulate to the correctness.

Mr. Mullen: I haven’t seen it, your Honor. I will be glad to accommodate Mr. Kimmell if it be signed. We can probably determine that right off the bat.

Q. (By Mr. Kimmell): I hand you a photostatic copy of a document bearing the title, “Bill of Sale.”

Whose signature does that bear?

A. The signature of Stewart Edward White.

Q. You know his writing so you know the signature? A. I do.

Q. It was acknowledged before whom?

(Testimony of Susan Crandall Kimmell.)

A. Before Willia N. Maguire.

Q. That bill of sale covers, among other things, the [123] "New Gaelic" and "The Old Gaelic" manuscripts? A. It does.

Mr. Kimmell: Your Honor, I offer this in evidence.

The Court: It may be received.

The Clerk: Defendant's Exhibit B in evidence.

(The document referred to was marked Defendant's Exhibit B and received in evidence.)

Q. (By Mr. Kimmell): Mrs. Kimmell, will you tell the court the circumstances and why this bill of sale was executed and delivered to you?

Mr. Mullen: I object to that, your Honor, as irrelevant, incompetent, and immaterial. She has the bill of sale. We are not contesting it. We concede the facts that are evident from the bill of sale, and the rest is immaterial.

The Court: Unless there is ambiguity I do not think the circumstances under which a contract is entered into are material.

Mr. Kimmell: Your Honor, maybe I can simplify this. People usually have reasons for executing and delivering documents.

The Court: She may state when it was delivered and the circumstances, but not as to explaining anything about it.

Mr. Kimmell: I don't want her to explain. I want her to testify as to when it was delivered——

The Court: Counsel conceded the genuineness of it, the [124] execution of it, from what he said.

(Testimony of Susan Crandall Kimmell.)

I think a question might be asked as to how she happened to be given the bill of sale.

Mr. Kimmell: That is my question.

The Court: That would call for the circumstances, but not for any reasons that might not be apparent from the bill itself.

Mr. Kimmell: I am a little awkward about this matter of examining. I appreciate the court's help.

The Court: You may answer.

Q. (By Mr. Kimmell): How did you happen to be given this bill of sale?

Mr. Mullen: For the purpose of the record, again, might I interpose the objection that it would be incompetent, irrelevant, and immaterial.

The Court: The objection is overruled, in view of the fact the defendant has sought by her answer a declaration as to proprietary rights. Such a declaration would not run only against the plaintiff, but anyone ever claiming it. I believe that question is proper. The objection is overruled.

You may answer.

The Witness: This bill of sale, as your Honor knows, was given to me in October, 1944, just two years prior to Stewart White's death, at a time when he was definitely preparing for his death and getting his affairs in order. [125]

He delivered to me all the manuscripts listed in the bill of sale at the time of the execution of this bill of sale, and particularly "Gaelic," because he felt that that was the only way in which it could be protected from being generally published or becom-

(Testimony of Susan Crandall Kimmell.)

ing public property, since it had not been published.

Mr. Mullen: At this point, your Honor——

The Court: That statement may be stricken.

Mr. Mullen: ——I move to strike that as being the opinion and conclusion of the witness.

The Court: That last paragraph may be stricken, particularly as to the “Gaelic Manuscript.”

Q. (By Mr. Kimmell): Then he gave you the bill of sale in anticipation of his death?

A. So he said, and those were the reasons he stated.

Q. He stated it was for the purpose of protecting the manuscript after his death?

A. He stated that.

Q. He wanted it to be in the hands of someone who would——

Mr. Mullen: I object to that as being leading and suggestive.

The Court: That is an argument. I will sustain the objection.

Mr. Kimmell: Very well. Let me try this question, your [126] Honor:

Q. (By Mr. Kimmell): He gave the bill of sale to you because he didn't want the manuscript in question to fall——

The Court: That is leading and suggestive. She has stated what he told her, and that is all. Leading questions are not permitted.

Mr. Kimmell: I am sorry, your Honor.

The Court: She is your witness.

(Testimony of Susan Crandall Kimmell.)

Q. (By Mr. Kimmell): How long have you known Harwood A. White, the plaintiff in this matter?

A. I believe I first met him around 1941 or '42.

Q. Was there any discussion between you and Stewart Edward White with reference to the connection of Harwood A. White with the work of Stewart Edward White in the field of metaphysics?

A. There was.

Q. What did Stewart Edward White say with reference to the connection of Harwood White with his work in this field?

A. He said that Harwood White had been anxious to publish "Gaelic" and he did not want him to get his hands on it, as he put it, and that it was—he didn't want him messing around with it. Those were his words.

Q. Did you ever receive a letter from Stewart Edward White in which he set forth his attitude toward his brother in this matter? [127]

A. I did.

Mr. Mullen: Your Honor, I will object to any further pursual of this line of interrogation upon the ground that the attitude of one brother toward another has no bearing——

The Court: Up to now it has been material to show that he did not intend to give any rights to the brother. But from now on the inquiry to show his attitude will not be material. For the purpose of this action the statement that has been made is relevant. Any further inquiry into the attitude

(Testimony of Susan Crandall Kimmell.)

toward the brother is not material to the subject here.

He did not claim a gift. As a matter of fact, the plaintiff here merely claims he had the same right as other people. He is not claiming any special right by reason of the relationship.

Mr. Mullen: That is correct, your Honor.

The Court: The statement that he did not want him to have it is enough. Many people endear themselves, after they are dead, to their relatives.

Mr. Kimmell: Then your Honor would not care to receive a letter setting forth Stewart Edward White's—

The Court: I have not looked at the letter. I did not know you were talking about a letter.

The Witness: Yes.

The Court: If there is a letter that has any bearing, that might show something concrete, yes. [128]

Q. (By Mr. Kimmell): I show you a type-written page bearing the words "Stewart Edward White" in the upper left-hand corner, and the words "Little Hill, Burlingame, Cal.," in the upper right-hand corner.

How is it signed? A. "SEW."

Q. Do you recognize the handwriting?

A. I do.

Q. Who signed that letter?

A. Stewart Edward White.

Q. That letter is dated October 26, 1944?

A. It is.

(Testimony of Susan Crandall Kimmell.)

Mr. Kimmell: I will offer it in evidence, your Honor.

Mr. Mullen: Just a minute. Before the offer is completed, your Honor, I would like an opportunity to examine the contents, if I might, please.

The Court: Yes.

Mr. Mullen: I believe, your Honor, after examination of the letter, that it bears again upon the proposition of the attitude of the brother, apparently bearing upon certain comments that Mrs. Kimmell would make.

I submit, your Honor, the contents of the letter would be incompetent, irrelevant, and immaterial, and not going to the subject of publication.

The Court: I will have to look at it and [129] see.

Mr. Mullen: Your Honor, I may say that "Beese" is Harwood White's nickname.

The Court: I think this letter is material. There is a paragraph there that is very important, which shows his desire to retain full rights to "Gaelic."

The sentence beginning, "The important point is that now I see that I have no right to let you in for what might be a disagreeable situation. The sort of squabble that just might arise if, after I die, he should rise and howl and attempt to do his own Gaelic, and show active resentment about an 'outsider,' " and so forth, is important. I believe this has bearing on the subject here. What weight to be given it is a question to be determined later.

The objection is overruled. It may be received.

(Testimony of Susan Crandall Kimmell.)

The Clerk: Defendant's Exhibit C in evidence.

(The document referred to was marked Defendant's Exhibit C and received in evidence.)

The Court: It shows an attempt to express proprietary rights over "Gaelic," that is, a manuscript, its contents and ideas.

As we are here dealing with the question as to whether he took it into public domain, that has a bearing, especially as the man is dead.

Anything that was undisputedly written by him, that might throw light on his relation to the manuscript, has some [130] bearing.

Q. (By Mr. Kimmell): Mrs. Kimmell, does that letter bear a stenographer's identifying symbol?

A. It does not.

Q. Mrs. Kimmell, what do you intend to do with the "Gaelic Manuscript"?

Mr. Mullen: I object to that as being incompetent, irrelevant, and immaterial.

The Court: I think you yourself have alleged that in the complaint, the reason you want the rights. You want your rights protected because you claim she intends to use it herself and you want her——

Mr. Mullen: Our allegation is that Mr. Harwood White wishes to write a book at this time, and Mrs. Kimmell will claim and does claim any use by him of the "Gaelic" material would be an infringement.

The Court: It is material. Furthermore, she asks that he be enjoined from claiming any right to it.

(Testimony of Susan Crandall Kimmell.)

Mr. Mullen: I will withdraw my objection.

The Court: Years ago I borrowed from someone, I have forgotten whom, an expression I used to use in school when I taught the subject of procedure and which I have used many times since, because "declaratory judgment" has been one of my favorite topics that I have written many articles on, both in the state court and the federal court. I used to use the [131] expression that "The beauty of this is that it turns law into a service station, rather than a repair shop." In other words, you can adjudicate rights before any harm is done by anyone.

Mr. Mullen: May your definition be used, your Honor, without infringing? It is a very apt definition.

The Court: I think I borrowed it from someone.

What is your intention to do with the manuscript?

The Witness: Nothing but guard it. I am not allowed to publish it, through Stewart Edward White's instructions.

The only part he wants published is that part that appears in "The Job of Living," which he wrote before he died.

The Court: I know that there was some French writer that left instructions not to publish manuscripts for so many years after his death. He forbade the publication at all during that time.

The Witness: Before he died, your Honor, he had written this manuscript which was later published as "The Job of Living," that contained, as

(Testimony of Susan Crandall Kimmell.)

Harwood White said this morning, that portion of the material that refers to living. The part of the material that refers to cosmology he felt was not ready for publication.

The Court: He does not want it published in that form?

The Witness: That is right.

The Court: I have not seen the bill of sale and I do not [132] know what it says. Go ahead.

Q. (By Mr. Kimmell): Mrs. Kimmell, Harwood White used the expression "distribution station" in his testimony this morning. Did you ever hear Stewart Edward White use that expression?

A. Yes, very often.

Q. What did he mean by the expression "distribution station"?

Mr. Mullen: Objected to unless the question is directed to what he stated in regard to his meaning.

The Court: That is right.

The Witness: He told me what he meant by "a distributing station" was a person who was interested in and well versed in this metaphysical philosophy, that could be of use to him in furtherance of the teachings, by talking to people who were interested and might have questions.

I might give an example of it in that various people who lived in my part of the State, for example, wrote to Mr. White——

Mr. Mullen: Just a minute. Is this what Mr. White——

(Testimony of Susan Crandall Kimmell.)

The Court: Unless he illustrated it that way——

The Witness: This is what happened to me.

The Court: You cannot tell that. What he told you to do is all right.

The Witness: What he said was that they might be of use [133] in talking with people who had questions to ask which could be answered better by conversation than by correspondence, but that it was in no way a dissemination of material over manuscripts.

The Court: I am not supposed to give you legal advice, but I will say this: This gives you the right to publish because it says so in so many words.

The Witness: Yes, that is right.

The Court: “* * * together with the right to publish or otherwise use said manuscripts in any way which she in her sole judgment shall determine.”

If you, in addition to that, chose to go by what he told you, that, of course, is a matter solely up to you.

The Witness: Yes.

The Court: Under this bill of sale the right to publish is given to you.

The Witness: That is true.

Mr. Mullen: I move to strike the portion of the witness' previous answer where she said he didn't want her to publish. She didn't, I believe, state anything with reference to a conversation, but rather an interpretation of an attitude. I think this should be connected up and a foundation laid.

(Testimony of Susan Crandall Kimmell.)

The Court: If that was a part of the conversation, it may remain. When that went in I had not read the bill of [134] sale.

I will say the bill of sale does give you the right to publish any of those.

Mr. Mullen: I didn't understand it was a conversation, your Honor, and perhaps we might have a foundation. If it was a conversation, I will withdraw my objection.

The Court: Is that a statement he made at the time this was executed?

The Witness: Yes, your Honor.

The Court: Then it may remain.

Q. (By Mr. Kimmell): Mrs. Kimmell, do you know of any copy or copies of this "Gaelic Manuscript" in public libraries in this State or anywhere else? A. No, I do not.

Q. Do you know of copies of this manuscript having been made available to the public in retail bookstores in this State or anywhere else?

A. No.

Q. Or in commercial lending libraries in this State or anywhere else? A. No.

Mr. Kimmell: That is all.

Cross-Examination

By Mr. Mullen:

Q. Mrs. Kimmell, I believe, if I am correct, you made [135] the statement you did not meet Stewart Edward White until the fall of 1941?

A. Until the summer of 1940.

(Testimony of Susan Crandall Kimmell.)

Q. As I understood you, you exchanged correspondence with him in 1940, but you never personally met him——

A. I met him in the summer of 1940. He came to visit us in 1940. I said I did not meet Harwood White until about 1941 or '42. It was Stewart I met in 1940.

Q. In the interim between the publication of "Gaelic" in 1933 and the time when you met Stewart White in 1940, you are not personally familiar with the various people and dealings that he had with the manuscript in that seven-year period, are you?

A. I am not. May I say, though, "Gaelic"—you said "the publication of 'Gaelic.'" "Gaelic" was never published.

The Court: The release——

The Witness: The mimeograph copies.

The Court: Let us say "disclosure," as we do in patent law.

Q. (By Mr. Mullen): You don't know the persons to whom the copies of "Gaelic" were sent in that period, who read it or exchanged it in that seven-year period?

A. I know some of them, and Mr. White told me about some of those people that received them.

Q. You don't purport, however, to represent, by any [136] sense of the word, you knew all the people to whom it was handed, or what their background or connection was, if any, with Stewart Edward White?

A. No.

(Testimony of Susan Crandall Kimmell.)

Q. You have no personal knowledge, do you, Mrs. Kimmell, as to what the cost of the making of copies was by Mrs. Oettinger? A. No.

Q. You don't know that they cost her \$2.00 flat and even, do you?

A. I don't know that they cost her \$2.00. I know about Mrs. Duce, who made the same copies.

Q. I am referring to Mrs. Oettinger.

A. No, I don't. I had no correspondence with her about it.

Q. When you stated that these friends of yours, to whom you gave Mrs. Oettinger's name, that sent Mrs. Oettinger \$2.00 for the copies, that was the cost, that is your judgment as to what——

A. That is my judgment, based on the fact that Stewart White, in his letter submitted as evidence, said she was to charge only the cost of reproduction. That would be a fair assumption then.

Q. You are not personally familiar with whether they cost her a dollar or a dollar and a half, or what? [137] A. No.

Q. You do know that copies were sold at \$2.00?

A. \$2.00 was paid for them.

Mr. Mullen: I think that is all.

The Court: Do you have any redirect examination?

Mr. Kimmell: I think not.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Kimmell: That is all.

We have the deposition of Mrs. Duce to be introduced. In connection with this deposition, your Honor, the title page says it is the deposition of Terry Duce. The name "Terry Duce" also appears on page 3 and also on page 1. She is referred to in the complaint here as "Mrs. Terry Duce." Terry Duce is her husband. May we have the record show that the name has been corrected to read "Mrs. Terry Duce"?

Mr. Mullen: I will stipulate the deposition that Mr. Kimmell is about to offer is that of Mrs. Terry Duce.

The Court: What is her given name?

Mrs. Kimmell: Ivy.

Mr. Kimmell: She states it in the deposition as "Ivy Oneita Duce."

The Court: It may be received and transcribed in the record in this case. [138]

The Clerk: Defendant's Exhibit D in evidence.

(The said deposition of Ivy Duce was marked Defendant's Exhibit D and received in evidence, and is in words and figures as follows:)

DEFENDANT'S EXHIBIT D

Be It Remembered, that on Tuesday, the 14th day of November, 1950, at 2:00 o'clock p.m., pursuant to written stipulation between counsel for the respective parties, at the Children's Hospital, 3700

Defendant's Exhibit D—(Continued)

California Street, San Francisco, California, personally appeared before me, John A. Theakston, a notary public in and for the City and County of San Francisco, State of California,

Ivy Duce, a witness called on behalf of the defendants.

Messrs. Schauer, Ryon & McMahon, represented by R. H. Shone, Esquire, appeared as attorneys for the plaintiff; and Leslie F. Kimmell, Esquire, represented by Tevis P. Martin, Esquire, appeared as attorney for the defendant, Susan C. Kimmell.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the said deposition be reported by John A. Theakston, a duly qualified official reporter and a [139] disinterested person, and thereafter transcribed by him into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Martin: Let the record show that Mr. Shone is appearing for Schauer, Ryon & McMahon, attor-

Defendant's Exhibit D—(Continued)

neys for the plaintiff; and Tevis P. Martin is appearing for Leslie F. Kimmell, Esquire, attorney for the defendant, Susan C. Kimmell.

And, Mr. Shone, will we have the usual stipulations?

Mr. Shone: All the usual stipulations. All objections are reserved, except as to the form of the questions, and so forth.

Mr. Martin: Thank you, sir.

IVY DUCE

being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Martin:

Q. Will you state your full name, please? [140]

A. Ivy Oneita Duce.

Q. And you are otherwise known as Mrs. Terry Duce?

A. Mrs. J. T. Duce.

Q. And where is your residence?

A. 33 West Sixty-seventh Street, New York City.

Q. And you are over the age of 21, are you not?

A. Yes.

Q. What is your occupation?

A. Housewife.

Q. Do you know the plaintiff, Harwood A. White?

A. I never saw him and I don't really know him,

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

but he called me on the telephone once; and so I wouldn't exactly say that was knowing him. I know of his existence. That's all.

Q. But you never met him personally?

A. Never met him personally that I ever recall.

Q. Do you know the defendant, Susan C. Kimmell?

A. Yes.

Q. How long have you known her?

A. I think since 1943.

Q. Where did you first meet her?

A. I could be wrong about that. It could have been——

Q. That is the best of your recollection?

A. That is the best of my recollection.

Q. Where did you first meet her? [141]

A. I met her at Stewart Edward White's home down in Hillsborough—or Burlingame, whichever one of those towns it is.

Q. Who was present at the time?

A. Mr. Don Stevens, who brought me down there, and my daughter Charmaine, and Mrs. Queenie Simpson. Mr. Stevens had driven the three of us down to see Mr. White.

Q. Do you know Stewart Edward White?

A. No. Wouldn't that be past tense? I did know him.

Q. Did you know him in his lifetime?

A. Yes.

Q. About how long did you know him?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. Well, I knew him from that day, from 1943 until his death.

Q. When you say "that day" do you refer to the day that you went down there?

A. That was the first day I met him.

Q. At that time Susan Kimmell was present, along with Don Stevens and your daughter?

A. Yes.

Q. And I believe you stated you were taken down there by Mr. Stevens? A. Yes.

Q. Did your friendship with Stewart Edward White continue until his death? [142]

A. Yes.

Q. Did you and Mr. White have a common interest in metaphysical and philosophical matters?

A. Yes, very definitely. I was studying metaphysics at the time I met him, and I had wanted to meet him long before, and I didn't wish to approach him, because I felt that sometimes these writers and people of that sort are beset by a lot of frustrated old women, and I didn't want to be put in that category. It so happened that one night I spoke to Mr. Stevens about Mr. White's books, all of which I had read, and Mr. Stevens was so impressed with these books after he read them that he went down and got acquainted with Mr. White. And following that then he made the introduction for me to meet Mr. White.

Q. Had you commenced your studies of metaphysical things prior to—

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. Oh, yes, long before that.

Q. Did you on that occasion discuss metaphysical and philosophical matters with Mr. White?

A. Definitely. That's what I had gone there for.

Q. And did you at any other time on any other occasions discuss those matters with him?

A. Well, we had an interchange of letters, and they must be in my files at home. That particular night I said to him I was very interested in the poor material that was [143] taught children and I wondered if Betty had ever given any material for children. And one time he sent me some little paper which he said that he had been instructed to give me, which pertained to children. I think I had several letters from him. As to actual conversations, I am a bit blurry about it. It was during the war years and transportation was very difficult and I went back and forth between the east and the west, and I can't remember when I came back out here from my trip east. We heard that he was in the hospital, and my daughter went out and bought a lot of flowers and took these boxes of flowers over to visit him, and they wouldn't permit her to see him, because he was so ill, and it was, I assume, the beginning of his final illness. But we felt close enough to him to do that. That is all I can say.

Q. I take it, then, from your answer that you were definitely interested in Stewart Edward White's theories and beliefs?

A. Oh, yes.

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

Q. And you also had friends who were likewise interested in those things?

A. Oh, yes. There were several of us here in San Francisco studying along these lines, and it was our interest in these things that promoted my friendship with him.

Q. Now, Mrs. Duce, did you ever remember seeing a manuscript called the "Gaelic Manuscript" or "The Old Gaelic [144] Manuscript"?

A. Very definitely.

Q. When did you first see it?

A. I didn't see it at his house, but I learned about it at his house. We were talking about things and I asked him whether or not Betty had a—had given out material about children or other matters which had not yet seen print, and he said that he had other material, and I said, "Well, why haven't you printed it?" And he said that he had been instructed by Betty, or the "invisibles," as he often called them, that this was not the time to print such material because of the war, that if they were printed at that time the material they contained was apt to—as I remember it, he made an analogy between Jesus' parable of throwing the seed on the ground where it would not bear, and he thought a lot of it would be passed by in the fervor of war.

Q. When did you—

A. So then I asked him if I could—if there was any such material of Betty's that I could see, and he said—well, he went rummaging around the place

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

to find this Gaelic Manuscript, and he said that it seemed incredible, "but I am out of a copy myself." He said, "There is a lady up in Portland by the name of"—As I remember, it was Ottinger—Oterger—O-t-e— [145] something. And he said, "I have allowed her to have—to make a few copies of it for a few interested friends, and you can probably get a copy from her."

Q. Do I understand from what you have told us that this conversation took place on an occasion of your first visit? A. Yes.

Q. When you were accompanied by Mr. Stevens and your daughter? A. Yes.

Q. And it took place in Mr. White's home?

A. Yes.

Q. Now, am I correct in remembering that you said that this was about 1943?

A. I believe it to be that.

Q. And there were no other persons present at that time?

A. Well, there was this Mrs. Simpson and there was Mrs. Kimmell.

Q. I see. Now, I show you here a mimeographed document consisting of 156 pages, with a blue cover on it, on the cover of which it states "Return to Stewart Edward White, Burlingame, California," and the number "26" written in pen and ink on it. And I ask you if you recognize that document (handing document to witness)?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. (Examining document): Well, this document, this [146] particular document I don't believe I have seen before, but I have a copy of it.

Q. In other words, is that a copy of the Gaelic Manuscript? A. I believe it to be so, yes.

Q. Or otherwise known as the Old Gaelic Manuscript? A. Yes.

Q. Do you know of your own knowledge whether or not that is a complete copy of the Gaelic Manuscript?

A. Well, if I were in my home and I could get the original that I have—I have three copies of it in my house in New York—I could tell you, but it's been quite some time since I have been—since I have even looked at the thing, so I am afraid I can't be too specific about it.

Q. That manuscript deals with metaphysical and philosophical problems, does it not?

A. Yes, entirely.

Q. Now, did Mr. White ever give you permission to make copies of that manuscript?

A. Well, I just started explaining to you what happened. He told me I could write to this Mrs. Oettinger and get a copy from her, and I wrote to her and she informed me that she had no more copies, but that she had some stencils and that they were very badly worn, but that if [147] I wished to I could make some copies from those stencils. So then, as I remember it, I wrote to Mr. White and asked him about it, and he said to me that it was

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

perfectly all right for me to make a few copies, but they were to be limited and that I was only to allow a few of my close friends to see them, that I must be very careful, in fact, to whom I showed them, because since they had not been published anybody could, you might say, steal the material; and naturally I wanted to protect his manuscript from anything like that. So I had these two or three friends here who were studying like I was, and we sent up to the lady and she sent us the stencils. And I had no mimeograph machine, and a Mrs. Cuthbert had a mimeograph machine and she turned out, as well as I can remember, about ten copies. I know she had to remake or recut some of the stencils, they made such bad copies. And I have been trying since you informed me that you were coming over to remember exactly what happened to these copies. If you wish me to say that now——

Q. Yes. There were ten copies made.

A. I think that is the exact number. It might have been eleven.

Q. As near as you can remember?

A. As near as I can remember, there were ten.

Q. And what happened to them?

A. And I still have three of them. And, as I said, I [148] have not referred to them for years, because I myself went into the study of mysticism, which goes far beyond occult phenomena, and I have just very occasionally read a few paragraphs of it to some of my students who might be puzzled

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

about something. I have three copies, as well as I know, on my shelf, and Don Stevens received one and we sent one to Mr. Stewart White because he said he was out of copies at the moment. And I believe Mrs. Cuthbert got one and Mrs. Ahlstrand and Mrs. Simpson got one, and I think we sent one to Mrs. Oettinger. Now, it may be that I sent two to Mrs. Oettinger, or it might be that I sent two to Mr. White—I don't know. But of the outsiders—from those two people the only ones I can remember giving a copy were Mrs. Cuthbert and myself and Mrs. Ahlstrand, Queenie Simpson and Don Stevens.

Q. Now, those people who received copies were known to Mr. White, were they not?

A. I don't think that—I don't believe that he had met Mrs. Ahlstrand or Mrs. Cuthbert, but we had mentioned them to him. [149]

Q. What I mean by that——

A. He knew who they were.

Q. He knew who they were, and you had his permission to give them a copy? A. Oh, yes.

Q. In other words, it was not left to you to distribute to——

A. Oh, no, because he had adjured me to be very careful as to who saw it, because he didn't want this material to fall into the hands of unprincipled people.

Q. In other words, I take it that you were given very definite instructions that no one except selected

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

groups or individuals could peruse that matter or even see it? A. Very definitely.

Q. And that the copies could not be loaned out or put into the hands of any other persons, unless he approved it or you?

A. He didn't say that. He said that unless I myself knew that they were people who were definitely interested in this work and that they were people that I trusted completely, because of the fact that the material was to him quite sacred and he didn't want it used by anybody for any purpose. In other words, he didn't want somebody to publish it or use any portion of it.

(Unreported discussion.) [150]

Q. He relied on your judgment?

A. On my discretion.

Q. Your discretion? A. Yes.

Q. In other words——

A. See, I was a teacher and he knew that, so that was why he relied on my discretion.

Mr. Martin: Mr. Reporter, I would like to ask you to mark this manuscript for identification as Defendant's Exhibit A.

(The document referred to above was marked Defendant's Exhibit A and attached to the deposition of Mr. Don Stevens.)

Q. (By Mr. Martin): To your knowledge, Mrs. Duce, were any of those copies ever sold through retail outlets?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. Of course not. The question of money might have arisen——

Q. We will come to that later. But I would like you to answer that.

A. Nothing that I ever had anything to do with was ever sold.

Q. Were any copies ever placed in a public or rental library?

A. None that I ever knew anything about or ever had anything to do with, nor any of these people that I speak of.

Q. In other words, none of those copies were offered [151] for sale by anybody? A. No.

Q. And they were never placed in general circulation? A. No.

Q. Were you at the time these copies were made engaged in selling books at retail? A. Me?

Q. Yes. A. No.

Q. Were you at that time operating a lending library? A. No.

Q. Or in any other type of business, except teaching of the metaphysical and such?

A. No.

Q. Now, a moment ago you spoke about some monetary consideration being involved, perhaps. Do you have reference to the cost of making these manuscripts? A. Exactly.

Q. Will you explain to us what the cost was and how that was had?

A. None of us had any money for setting up

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

something and paper was very scarce. Even carbon was scarce. And I said a while ago that Mrs. Cuthbert had a mimeograph machine. I don't remember now—it was so many years ago—whether she had it or whether she rented it, or what. But, at [152] any rate, when she got through with these copies—there are a great many pages of it, and our pages were much smaller than those—she arrived at a figure of something like two dollars to cover the exact cost of this carbon paper and the covers and the staples and putting the thing together, and that's what each of us paid. And another thing is that they, as it were, donated or gave Stewart Edward White and Mrs. "Oterger" a couple of copies, and their copies came out of this couple of dollars.

Q. There was no profit, in other words, made, no pecuniary profit made on it?

A. I can't imagine any.

Q. Are you familiar with a book, "The Job of Living," by Stewart Edward White?

A. Frankly, I have not read it and I never heard of it until just recently. I have not kept up with his work, because, as I said, my own field has gone into the realm of work which comes from India and I have sort of put this behind me. I read something about "Wings of—" —"Wings" something—the last one of his books I read.

Q. Did you ever have any conversation with Mr. White at any time about his desire to have the manuscript published or not published?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. Well, he seemed to be very cagey about it. At the time I spoke to him I was then rather new in these things and [153] I was—I felt very badly that here was all this material being bottled up, and so I asked him why he didn't publish it. And, as I remember, he said to me, "I only do things the way I am instructed." And I gathered by that he meant Betty, his wife, or the "invisibles," as he called them, and they didn't seem to think that was the time to do it. And I know he was very firm in his attitude that he would not publish anything, except as he was told to do it and except in such a manner as he was told to do it.

Q. You had no subsequent conversation with him about his ultimate wishes regarding that, did you, later? A. I can't seem to recall any.

Q. Now, one further question, Mrs. Duce. In your loan of this manuscript that you have, or copies of the Gaelic Manuscript, the restrictions and limitations as placed upon you by Mr. White were fully and faithfully carried out, were they not?

A. But definitely. I thought a great deal of Mr. White and I would naturally protect him in every way, and I was very appreciative that he should have permitted me to have the manuscript and trusted me with it.

Mr. Martin: That is all. Thank you.

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

Examination

By Mr. Shone:

Q. Mrs. Duce, do you teach at any recognized school? [154]

A. I do now, but I did not at that time.

Q. I see. Where do you teach now?

A. Well, I am the recognized head of the Sufi Order and I teach in New York and I have pupils in other parts of the country, including here.

Q. Is it classroom teaching, or is it by some other means?

A. I think you would consider it classroom teaching. We don't do correspondence course, if that's what you mean.

Q. In other words, it is by——

A. But I have—Mr. Stevens is now one of my teachers and he teaches here for me, and I have just come out on sort of an inspection trip for a couple of weeks. The order was here for thirty years before I ever got this position.

Q. What does that teaching comprise? What subjects?

A. Mysticism; not as Americans think of it, but as the people in India think of it. Americans think a mystic is somebody that talks to the fairies or to God, or something like that.

Q. What is the mysticism as you teach it?

A. The same thing as the Jewish people call Ein Soph or the Greeks call Sofia.

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

Q. And previously you were in the field of metaphysics? [155] A. Yes.

Q. I understand that you received the first copy of this manuscript known as the Old Gaelic from Mrs. "Oterger" [Oettinger or Oettlinger] by mail, is that correct?

A. No, it isn't correct. I got the stencils from her.

Q. Yes, the stencils. And how did you receive them from her? A. By mail.

Q. From her home? A. Yes.

Q. Do I understand that Mr. Stewart Edward White told you that he objected to having the Old Gaelic Manuscript published during the fervor of war? Was that what you said?

A. He said that he would not have it published until he was instructed by Betty and the "invisibles" that he should do so, and that they had told them that that period during which it was under discussion with me was not the proper time, and that he probably would not—that it would probably not be done until after the war, if ever.

Q. Now, he objected, of course, from what you have told us, to the Old Gaelic being reproduced and published, but I take it he had no objection to its being reproduced in certain numbers in mimeographed form, is that right?

A. Well, I think that one can pose legal questions [156] that might lead to wrong answers. I think that he was very anxious that the meta-

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

physical knowledge which his wife—his wife's faculties gave in these manuscripts—should be given to those who were evolved enough or capable enough of understanding. He never attached any monetary interests to these things, because he told me that he never accepted a penny for the Unobstructed Universe since she had given it to him, and he wanted to be able to say that he believed it, and he felt he could not even say that if he had accepted money for it. He was extraordinarily ethical, and it was only—he had a love for people like myself who were interested and believed in these things, and he felt that a few of us might be permitted to share this knowledge, as long as it was not in the wrong hands, you might say. And he knew that we wouldn't get any money for it or use it for money, or anything like that.

Q. He was perfectly willing to rely upon your discretion, insofar as the distribution to your friends or acquaintances of this manuscript was concerned?

A. He was, except that I must make it clear that he never had any idea that there were going to be more than ten or a dozen of them at the most at any time. I mean I made that quite clear to him. It was not that I was the rest of my life to have the opportunity of spreading these manuscripts around. It was only that during this time when it had not yet [157] been published and when he didn't know whether it would ever be published or

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

not that I could share it with a few friends who had the same interest.

Q. Mrs. Duce, on this manuscript that Mr. Martin showed you a moment ago, marked Defendant's Exhibit A, I show it to you again (handing document to witness). Is that in the same form as the manuscript that you have at your home?

A. Well, as I told you, mine looks like that, but the pages are only about this long (indicating). They are regular manuscript pages, and I have not looked at the thing for quite a number of years. It looks to me exactly like it.

Mr. Shone: For the record, Mrs. Duce indicated that the pages were approximately three inches shorter, I believe, than the pages in this manuscript. Is that right?

A. We just made ours differently, that's all.

Q. The set-up, I mean—the physical set-up is different?

A. Yes, but we put them and bound them like that and we put a nice cover on them (indicating). That's the way they are now.

Q. Now, the copies that you have, were they made from this stencil that you received from Mrs. "Oterger"? A. Yes.

Q. And does this appear to have been made from a different stencil or a different— [158]

A. I would not want to be pinned down on that, because it was too many years ago. We have been through a war and I have been back and forth over

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

the country and abroad and into India, and one thing and another, and I don't know.

Q. In any event, as I understand it, the manuscript that——

A. It would be my guess that it looked like that.

Q. About several inches shorter? A. Yes.

Q. And set up——

A. In other words, this is on what you would call legal script (indicating document), and mine was on regular typewriter bond.

Q. That is what I was getting at. Thank you. Did you ever have any correspondence with Mr. White in which he instructed you not to reproduce this manuscript in published form?

A. He didn't need to, because he had already discussed it with me.

Q. But you had no correspondence, then, along that line?

A. I don't know. I don't remember any correspondence, because we talked it over very carefully. He was a gentleman and ethical, and I was a lady and ethical, and there wasn't any need to impress that upon me because we never [159] considered such a thing. I don't believe there has been but only one student has looked at my manuscript for probably six years.

Q. That is partly because you have no further interest in it yourself, as you have told us, in that particular field?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. No. They were packed away with my books, and when I moved to New York this time—after I came back from the Near East—they were put on a shelf there, along with the rest of my things, but I have not looked at them in a long time.

Q. Did you say something about Mr. White not wanting his manuscript stolen? Did you use that word?

A. I don't think he said that. What he inferred was that—after all, he had a great deal of subtlety and delicacy, and what he inferred was that since the material had not been published I must naturally be careful not to allow someone to have the manuscript who was not completely ethical and who would not take good care of it, because if they would not take good care of it somebody who was not ethical might choose to use some of the material on their own. It's been done before.

Mr. Shone: Thank you.

Mr. Martin: Just one more question.

Redirect Examination

By Mr. Martin:

Q. Do you know of any person besides yourself who has ever been given permission by Mr. White to [160] make copies?

A. Mrs. Oettinger or Oettlinger; he might have given Mrs. Oettinger the right.

Q. Do you know how many she made?

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

A. No, I don't know a thing about the woman. I never met her and I only had—this Mrs. Cuthbert and I had this little correspondence with her, and I didn't know anything had come up until—what is his name?—the brother?—Harwood?

Q. Harwood?

A. He telephoned me in New York a few months ago and told me that he was upset because it had not been published, and I said, "I guess it is very strange, because—" I don't think this should go into the machine, but my teacher who—my Sufi teacher here knew the Whites very well—

Mr. Shone: Is that what you told Mr. Harwood White?

A. No, no. I am simply saying that my teacher knew the Whites very well, and she told me that Mr. Harwood White was not as balanced in his thinking as Stewart. And so after he had telephoned me I began feeling a bit dubious and wondering what on earth was going on. And then I wrote a letter to Mrs. Kimmell, since she was the one I knew, and I said, "What is happening?" So [161] then she wrote me a letter and said that Mr. White was insisting on a suit, and that's the first I knew that this book, "The Job of Living," had been brought out, taken from the Gaelic manuscript.

Q. (By Mr. Martin): Now, in the complaint in this action Mr. Harwood A. White alleges that Stewart Edward White permitted one Mrs. Terry

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

Duce to reproduce, distribute and sell copies of said manuscript to her friends and acquaintances.

A. That is not correct.

Q. That is not correct?

A. He never gave me any permission to sell copies. What is he thinking of—his brother?

Q. All you did was have specific copies made with Mr. White's permission? A. Yes.

Q. And the cost of mimeographing and the paper, and such like, was contributed by a certain small group of people?

A. And the small sum we contributed we made large enough so that we could make the several extra copies to go to Mr. White and to Mrs. Octinger.

Q. And no copies were ever sold or distributed freely as directed by him? A. How could we?

Q. (By Mr. Shone): Did you meet Mrs. Kimmell, Mrs. Susan Kimmell, the first time you went to Mr. White's home? [162]

A. Yes, yes. He introduced her to me there as his—I don't know—you might say his chosen and trusted companion—and I don't know whether—it seemed to me he said she was a cousin. I am not certain, but I know she was a very, very close person in his confidence, and that he trusted her very much, just by his attitude and by the things that they said.

Q. Did you see her at any time after that—Mrs. Kimmell?

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

A. No. I had no occasion to see her. I have been in the east since 1945 and—in fact, I went back east almost immediately after I had this conversation with Mr. White. I went back east and I came back here, and then I went back east and stayed from 1945 on; and I have been out here on a couple of small trips, but I haven't lived here since 1945.

Q. But, in any event, when Harwood White called you shortly thereafter——

A. That's the first time I ever heard of him. I mean ever had any contact with him. And then he sent me a long affidavit that he wanted me to fill out, and I didn't want to fill it out; I told him that if he had any problems he could have Dutton's—or Putnam's—or whoever it is in New York that does the publishing—to speak to me, because I didn't want to get embroiled in any suits over such foolish things.

Q. But, in any event, after Mr. White did call you [163] you called Mrs. Kimmell, is that correct?

A. No. I wrote her a letter and I asked her—I said, "Sufis believe that there is always two sides to every question. Just what is going on?" And she wrote me back and said that this man was insisting that this was a published manuscript, and therefore he had the rights to it, and I have every conviction this is untrue.

Mr. Shone: That is all.

Mr. Martin: No further questions.

/s/ IVY ONEITA DUCE.

Mr. Kimmell: Now, Mr. Clerk, there were no exhibits in connection with this particular deposition, were there?

The Clerk: That I do not know, sir. There are some extra exhibits that I did not identify.

Mr. Kimmell: I also offer in evidence the deposition of Don Stevens.

The Court: The deposition of Don Stevens will be received and transcribed in any record that is prepared in this case.

The Clerk: Defendant's Exhibit E in evidence.

(The said deposition of Don E. Stevens was marked Defendant's Exhibit E and received in evidence, and is in words and figures as [164] follows:)

DEFENDANT'S EXHIBIT E

Be It Remembered, that on Friday, the 10th day of November, 1950, at 4:00 o'clock p.m., pursuant to Stipulation re Depositions, hereto annexed, at the offices of Hart & Hart, Suite 715, Chancery Building, 564 Market Street, San Francisco, California, personally appeared before me, N. S. Stoll, a notary public in and for the City and County of San Francisco, State of California, Don E. Stevens, a witness called and examined by the defendant Susan C. Kimmell.

Messrs. Schauer, Ryon & McMahon, represented by R. H. Shone, Esquire, appeared as attorneys for the plaintiff; and

Leslie F. Kimmell, Esquire, represented by Tevis

Defendant's Exhibit E—(Continued)

P. Martin, Esquire, appeared as attorney for the defendant Susan C. Kimmell.

The said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the notary public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the deposition be recorded by Harvey D. Prather, a duly qualified official reporter and a disinterested person, and thereafter transcribed by him into typewriting, to be read to or by the said witness, who, after [165] making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witness should be instructed not to answer questions propounded by counsel, in the absence of the notary public, it shall be deemed that the notary public has so instructed the witness to answer, but that he still refuses to answer.

Mr. Martin: May we have the usual stipulations, Mr. Shone?

Defendant's Exhibit E—(Continued)

Mr. Shone: Yes, all the stipulations; they are all reserved.

Mr. Martin: All objections are reserved except as to the form of the question. And stipulated the notary may be excused?

Mr. Shone: Yes.

Mr. Martin: And should the witness be advised not to answer the question it is deemed he has been instructed to answer by the notary, and so forth?

Mr. Shone: Yes, that is understood, of course.

DON E. STEVENS

being first duly cautioned and sworn by the notary public to [166] tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Martin:

Q. What is your full name, please?

A. Including the middle initial—I mean the middle name?

Q. Yes. A. Don Eugene Stevens.

Q. And where do you reside, Mr. Stevens?

A. Rural Route 1, Box 819, Mill Valley.

Q. And your occupation?

A. I am assistant to the vice-president in charge of manufacturing and research of the Stan-Cal Asphalt & Bituminous Company.

Q. Do you know Harwood A. White?

A. I believe that I have never met him.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. Do you know Susan C. Kimmell, one of the defendants in this action? A. I do.

Q. Did you know Stewart Edward White in his lifetime? A. Yes.

Q. When did you first meet him?

A. During the winter of 1942 to 1943.

Q. What were the circumstances under which you met him?

A. I had read a book of Mr. White's which interested [167] me very much, and so with a wild idea that I might possibly be able to meet him, I sent him a letter asking if there would be any possibility of discussing some of the contents of the book with him, and perhaps after a day or two at most I had a very prompt reply from him, saying he would be very happy to discuss any matters he had in the book and I only needed call him on the telephone and we would have a mutual appointment, and I did so, and perhaps a week or two later met Mr. White and discussed these things that had interested me.

Q. Where did that take place?

A. At Mr. White's home.

Q. Were there any other persons present?

A. There was his man, who had been with him quite some years at that time, who let me into the house, who did the same on several occasions after that.

Q. Did your acquaintanceship with Stewart Edward White continue until his death?

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

A. It did.

Q. Did you visit at his home frequently?

A. Very frequently; I was just a few miles from him, as a matter of fact.

Q. At that time you lived where?

A. He lived in Hillsborough and I lived at South San Francisco. [168]

Q. During the course of your visits to his home did you have any opportunity to read his unpublished manuscripts?

A. On various occasions he would quote passages from certain of his unpublished manuscripts to illustrate a point to me. I don't know those particular ones, but after I had known him for six months to a year he felt there was certain material which was contained in a manuscript which he called the Gaelic papers, which he would lend to me, provided I would take very careful care of it and not allow it out of my own hands—at least without checking with him.

Q. When you say the Gaelic papers, that is known as the Gaelic manuscript, or the old Gaelic manuscript? A. That is correct.

Q. In other words, they are synonymous, all the same manuscript? A. Exactly, yes.

Q. He said you couldn't loan them to anybody else without his express permission?

A. That was a very meticulous point he made.

Q. And he insisted upon that without reservation at all times? A. That is very true.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. Did you borrow the manuscript on several occasions?

A. I borrowed it, I believe, on two occasions; first, to read it myself, and on one occasion to lend it to a friend. [169] I believe on that occasion it was Mrs. James Terry Duce to whom I lent it; it interested her very much, the manuscript.

Q. I show you herewith a bound—well, it is a brown manila folder in which is enclosed a mimeographed booklet, let us call it, with blue cover, and ask you if you can identify that material?

A. This was the Gaelic manuscript; I know that of my own knowledge.

Q. Do you know of your own knowledge whether or not that is a full and complete copy of the Gaelic manuscript?

A. I wouldn't know unless I went through it entirely, but the table of contents are identical with the one that I had borrowed on that occasion.

Q. During the course of your friendship with Stewart Edward White, did you have any talks with him regarding publication of this Gaelic manuscript?

A. Very often; as a matter of fact, after I had read the Gaelic manuscript I told him I thought that was the most valuable material which I had seen of his. I had read his various published books at that time, and his Gaelic manuscript was of such great interest to me I said I thought it was very, very important it be published also. Mr. White told me at that time that he had been instructed by what

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

he called the invisibles not to publish the Gaelic manuscript until he had further instructions from them. As a consequence I would [170] frequently ask him, "Well, what do the invisibles say about the Gaelic manuscript now?" And he would always say, "Well, it's not to be published," and eventually he read me a quote from a book he had published at that time, and said this book was to contain certain material in the Gaelic manuscript, and that pleased me because I was happy that certainly the Gaelic manuscript was to become published too. I had a little fear in the back of mind and I said, "Is this all the material of the Gaelic that will be published?" and he said, "Yes, this is all that will be published."

Q. Where did those conversations take place?

A. At his home.

Q. Were there any other persons present?

A. Not this last conversation when he said it was all of the Gaelic manuscript to be published.

Q. Can you recollect for us, sir, the approximate date that that conversation took place?

A. That was not too terribly long before he was taken ill and died. As a matter of fact, I would say it couldn't have been more than a year previous to his death, perhaps a year and a half, to the most.

Q. Was there any other person present when you discussed publication of this manuscript with Mr. White?

A. Not this final discussion. I believe on one

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

previous occasion when Mrs. Duce, a friend of mine who was also [171] interested in the Gaelic manuscript, when she had accompanied me to the home also, inquired of him about the publication, and had been informed that the invisibles said it was not to be published yet.

Q. And then in the course of your previous answer you mentioned a book that Mr. White stated to you certain excerpts from the Gaelic manuscript were going to be published in? A. Yes.

Q. Do you remember what the title of that book was?

A. He originally, as I recall, titled it "The Job," and then later on said "The Job" had been renamed and apparently had been called "The Job of Living."

Q. Have you ever seen this book called "The Job of Living"? A. Yes, I have.

Q. Have you read that book?

A. I have read portions of it.

Q. Have you checked the book to see how much excerpts from the Gaelic manuscript are contained in it?

A. To my way of thinking there is a great deal of important material in the Gaelic manuscript which is not included in "The Job of Living."

Q. So in the book, "The Job of Living," there are only small portions, comparatively, of the original Gaelic [172] manuscript, as you know it?

A. That is entirely correct.

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

Q. And those are the portions which Mr. White told you were the only parts he ever wanted published? A. That is exactly correct.

Q. That is correct? A. Yes.

Mr. Martin: Mr. Shone, may we ask the reporter to mark this manuscript on the cover as "Defendant's Exhibit A for identification," and "The Job of Living" as "Defendant's Exhibit B for identification"?

Mr. Shone: Yes.

(Manuscript marked "Defendants' Exhibit A for identification," and book entitled "The Job of Living," marked "Defendant's Exhibit B for identification.")

The Witness: May I offer this, possibly, as a way of clarification, I do not know whether it had been White's original intention to call this particular book "The Job," or whether that was his abbreviation and called it "The Job of Living." He always called it "The Job" when he talked with me.

Q. (By Mr. Martin): Now, I take it from your answer you know Ivy O. Duce? A. Yes.

Q. She is also known as Mrs. Terry Duce, is that [173] correct?

A. Mrs. James Terry Duce.

Q. Did you introduce Mrs. Duce to Mr. White?

A. Yes, I was the one to introduce her.

Q. Where did that introduction take place?

A. At Mr. White's home also.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. Were there any other persons besides yourself and Mr. White and Mrs. Duce?

A. That is rather difficult to answer. I am quite certain her daughter was there, and there may have been one other person on that occasion.

Q. Can you give us the approximate date of that introduction? A. That I couldn't.

Q. Have you any general idea of any approximate time?

A. If I were guessing I would say probably in around 1944.

Q. Were you present when Mrs. Duce asked permission to make copies of the Gaelic manuscript?

A. It's very difficult to bring back a lot of the small details of that period. I believe—my present recollection is that on this occasion Mrs. Duce inquired of Mr. White in further detail regarding the publication of the Gaelic manuscript, and was told by him that he still did not have his instructions to publish it from the invisibles, as [174] we previously discussed. But going on further, I believe it was also at this first introduction that Mr. White suggested that there had been a set of mimeographed stencils made, and she might be able to obtain a set to make a reproduction for herself. He questioned her at that time in a manner similarly as he had done me in the past.

Q. What do you mean by "he questioned her"? Will you explain that?

A. Well, that boils down to this: Mr. White's

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

sincere feeling that material of value to a certain progress should be made available to other persons who were capable of absorbing and assimilating it. At the same time he had no compunction of letting it be lent by himself or some one under his careful control, to another party, but he was very, very definite, adamant on the point that until he had positive instructions from the invisibles that it was to run no chances of getting out to the general public.

Q. Can you identify the manuscript which I have heretofore shown you as one compiled from those stencils to which Mr. White referred?

A. They are the same. I have had both types of copies, one original lent to me by Mr. White, and also those from the stencils which Mrs. Duce borrowed, and they are the same manuscript.

Q. Can you say whether or not the manuscript or [175] mimeographed copy of it Mrs. Duce made from the stencils is a complete copy of the manuscript?

A. That I know in considerable detail, because there is considerable complication; there were at least four or five pages missing in toto from the copies which she made.

Q. Do you know, Mr. Stevens, the number of copies which were made by Mrs. Duce?

A. To the best of my recollection, which I must be guided by, it's my belief it was in the neighborhood of ten.

Q. Do you know what happened to those copies?

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

A. One was given to me; there were at least two or three which were given back to Mr. White; Mrs. Duce I know retained one. I believe one or possibly two were given to a woman who had originally made the stencils, and I believe that one or two went to a couple of Mrs. Duce's and my friends here in San Francisco.

Q. Were those persons who obtained those copies persons that Mr. White had authorized to have copies of that manuscript?

A. They were persons whom Mrs. Duce and I assured him fell under the category of individuals who were entirely reliable, who would profit by the use personally of the reading of the manuscript, and who could be relied upon not to disseminate it.

Q. In other words, he knew at the time to whom those [176] manuscripts were going and permitted that only on your recommendation that they were fit and proper persons?

A. I think that would be a little bit more extreme than was actually the case. Mr. White had known myself for quite a considerable time and trusted my statement that they would not go to any one who was not entirely reliable. However, I do say this, that those persons in San Francisco who got copies, one of them was known to Mr. White—had been introduced to him, and they had had an extended conversation—very pleasant friendship. The other one in San Francisco to whom a copy was to go, to the best of my recollection, had not met Mr. White.

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

Q. Now, was there any specific stipulation in regard to the number of copies that could be produced?

A. These things are never arranged with a meticulous, precise, predetermination of all details. I think if I said "Yes," it would give a wrong impression. If I said "No" it would give a wrong impression. Mr. White did not specifically state there were to be eight and no more than eight, and on the other hand the entire agreement, the ethical agreement between Mr. White and myself and Mrs. Duce was there was to be a very small, limited number of copies, and he would trust her to handle it with discretion.

Q. When you say "trust her to handle it with discretion," do you have reference to the persons to whom those [177] copies were to be loaned or presented? A. I would, very definitely.

Q. Can you tell us, if you know, Mr. White's reasons for those restrictions?

A. It's a very, very simple question. He had had specific instructions, he stated many times, that he was not to publish this manuscript until he had instructions to do so from the invisibles, and he abided by that doctrine constantly.

Q. And I believe you told us the only part he wanted of this manuscript published appeared in the book, "The Job of Living"?

A. That was the final statement to me on the subject, and I never queried him again after that

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

point, because it was a closed matter as far as I was concerned.

Q. And all the mimeographed copies, as I have shown you there as Defendant's Exhibit A for identification, were fully and completely controlled by his restriction placed upon you and Mrs. Duce?

A. As a matter of fact, we went to the extent of putting a flyleaf or page in Mrs. Duce's copy that this was specifically property of Stewart Edward White and there was to be no further duplication from these copies.

Q. Do you know of your own knowledge whether or not any of those copies were ever sold? [178]

A. Again that's a type of question where my only feeling is it is ridiculous to say "Yes" or "No." The people to whom those copies were given were persons that I know personally would never part with them for monetary consideration.

Q. I see your point, Mr. Stevens. Do you have any knowledge of Mrs. Duce ever selling those copies at retail or through retail outlets?

A. I know very definitely she did not, and would not consider it.

Q. Do you know whether or not she ever placed them in a lending library, or anything of that sort?

A. That was entirely against the restrictions Mr. White placed on the matter, and I know she would not do it and did not do it.

Mr. Martin: Thank you, that is all.

You may cross-examine.

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

Cross-Examination

By Mr. Shone:

Q. Mr. Stevens, this last matter, I presume you base your opinion as to what Mrs. Duce would or would not do with these manuscripts on some personal knowledge you have of her mentality?

A. Not only her mentality, but we study along different lines together, and I know of her adherence to her word.

Q. That is what you base that conclusion on?

A. Entirely. [179]

Q. Did you say you thought she had produced about ten copies? A. In that neighborhood.

Q. And upon what do you base that conclusion?

A. There are very many conversations I had with Mrs. Duce at the time and also these later conversations I had with her when we were trying to complete the actual details that went on.

Q. And that was for the purpose of testifying, was it, in this lawsuit?

A. Not originally. We understood that Mr. Harwood White intended to try to gain control of the Gaelic manuscript, and I was on the east coast at that particular time, so we knew nothing at all about the lawsuit, that we might be called up to testify in at that point, but we were trying for the best of our own conscience sake to reconstruct just exactly how the whole picture had fitted together originally.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. So you went over and discussed these various matters and various dealings?

A. I did not discuss with Mrs. Duce my personal contacts with Mr. White, but only discussed with her the reproduction of the manuscript.

Q. In other words, the number that had been produced and to whom they had been delivered or sold, as the case might have been? [180]

A. That's right, and incidentally we shouldn't say they were sold to any one.

Q. In other words, as I understand your testimony, none of these manuscripts were ever sold to any one, they were given to them, is that right?

A. There was a purse made up of funds to repay the person who had gotten the stencils together, had paid the postage on them, and bought the paper, and they had actually rented a machine, as I recall, and run them off, so the various ones of us had to chip in the approximate amount which had been entailed in making these copies, and if that could be conceived as being a sale, I think it would be stretching the term considerably.

Q. How much money was spent for that purpose?

A. Each of us paid approximately two dollars to the duplicator for our copy, which would indicate that there was somewhere between twenty and twenty-five dollars collected in this fund, and I believe that is correct.

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

Q. In other words, there were about ten or twelve persons that contributed, is that it?

A. No, as a matter of fact there wasn't even that much money, because at least two or three of these copies were retained to White, gratis, and as I recall, there were two or three copies returned to the lady in Eureka, or wherever it was; I don't know who she was; and that would [181] have left in the neighborhood of five copies, so that would have meant the entire sum put into the purse would amount to ten dollars at most. I believe also the lady who duplicated them was given her copy without any financial contribution because of her efforts. So perhaps eight dollars would have been the approximate amount of money.

Q. I see. In other words, you and Mrs. Duce and possibly two other persons paid the cost?

A. That is entirely correct.

Q. And then these other people whom you have named received one or more copies for the reasons you have given? A. That's right.

Q. Now, I also recollect you to have said that Mr. White did not in advance of the time the people received this manuscript know the actual persons who were going to receive them, but relied upon yourself and Mrs. Duce and anybody else you and she permitted deliveries of the transcript to, is that correct?

A. I am not trying to withhold any information, but those are details that are impossible for me to

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

remember specifically. I do recollect the only other two persons in San Francisco who received copies, one of them was known to Mr. Duce, and I believe the other one had not met him at that time.

Mr. Martin: Pardon me, did you mean Mr. Duce or Mr. [182] White?

A. Mr. White, excuse me.

Q. (By Mr. Shone): As I recall, however, you said in direct examination that the manuscripts were delivered or distributed by either yourself or Mrs. Duce to persons whose names may not have been and actually were not known to Mr. White in advance of the distribution, but that Mr. White relied upon you and Mrs. Duce, as the case may have been, and your background and understanding, and had the confidence in you to allow you to distribute them to persons who he would be satisfied with, wasn't that your testimony?

A. That was the general course of events.

Q. Now, so far as you know, there were only two other persons in San Francisco besides yourself and Mrs. Duce to whom these manuscripts were given, is that correct?

A. That is correct; that is the best of my recollection.

Q. Do you know how many people Mrs. Duce may have given manuscripts to?

A. That is the entire number that I am speaking of now. I gave none to any party; Mrs. Duce, as I recall, gave out two to persons in San Francisco,

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

and that is the entire amount that were passed out.

Q. So far as you know? A. Yes. [183]

Q. Now, do you know a Mrs. Otteringer?

A. The name is familiar, but I don't know that I do; I don't connect it.

Q. Mrs. Margaret Otteringer, I believe, of Palo Alto, if that refreshes your recollection?

A. Not a bit.

Q. You have never heard that Mrs. Otteringer reproduced or distributed any of these manuscripts?

A. I have no recollection of that. I just know nothing about all that; I may have at one time, but I certainly don't at this point. That could conceivably, though, be the name of the lady—did she perhaps move from Palo Alto to Eureka, or somewhere north, and was she the one from whom the stencils were borrowed?

Q. I am not familiar with that, and can't say.

A. If that is true, if that is she, then I did know that Mrs. Otteringer had made stencils, but I wouldn't know the number of copies she made or the disposition.

Q. You only know of one occasion when stencils were made, is that correct?

A. That is entirely correct.

Q. Now, do you know who retained possession of the stencils?

A. Those stencils were sent back to the originator.

Q. Who was that? [184]

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

A. I don't know the name.

Q. Who do you mean by "the originator"?

A. Whoever originally made the stencils.

Q. And you don't know who that was?

A. If it was this Mrs. Otteringer that moved from Palo Alto up north, then that was she.

Q. Who was the person who did make them?

A. I recall that was a Mrs. Cuthbert, in San Francisco.

Q. And was she also a person interested in this same field of metaphysics?

A. To a degree, at the time that Mrs. Duce was was here. She was not as deeply interested as Mrs. Duce, but to a certain degree on that point.

Q. Did you ever have any contact with her afterwards?

A. On occasions I have been at her home.

Q. Is she a person interested in that field today?

A. I have not seen Mrs. Cuthbert for perhaps two or three years, and the last time I saw her I believe she was primarily concerned with her relationship to the Episcopalian church.

Q. Did you say a moment ago—I don't recall where Miss Cuthbert resided. In San Francisco?

A. That's correct.

Q. Do you know the address?

A. I don't, not now. [185]

Q. Now, this manuscript that was first given to you of the Gaelic by Mr. White, was that in the

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

same form as this Defendants' Exhibit A that was just shown to you?

A. It had a blue cover, that I definitely recall. I do not think that it was mimeographed, but I believe that it was actually all stenciled as the index is here.

Q. In other words, the index appears to be a replica, would that be correct?

A. That's right. This is a larger size paper than the one which White originally lent to me.

Q. So that apparently is different, in so far as the physical makeup is concerned, than the manuscript he gave to you?

A. Let's put it this way, this is not identical as far as paper size is concerned.

Q. What about the type of print, and that sort of thing, is it similar?

A. Due to the fact I have handled the two different types of copy, I don't know if this resembles, which this one resembles so far as type is concerned.

Q. In other words, you don't know if that is the one made from the stencil or is similar to the one Mr. White gave to you originally, is that right?

A. It's just too hard to recollect now.

Q. You just don't recollect? [186]

A. That's right. I judge it entirely by the subject matter content.

Q. But your recollection is this one is different in paper size, is that correct?

A. That is my recollection.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. Do I also recollect—I don't want to be repetitious, but I want to be sure—I understood you correctly, did I, I also recollect you testified the total number of these mimeographs made from the stencil were about ten? A. Approximately.

Q. Were there any other copies other than those mimeographed that Mr. White would have in his home, that he would give to persons such as yourself?

A. No, as a matter of fact the copy which Mr. White lent to me at that particular time, he said that he very, very definitely must be sure to have back, as it was his only copy.

Q. How did you first become acquainted with this present lawsuit, Mr. Stevens?

A. I can't recall whether it was by direct communication from Mrs. Kimmell saying there was to be a lawsuit and what did I remember of the case, or whether I was in New York at the time Mrs. Duce received her letter from Mrs. Kimmell.

Q. Do you know the names of any other persons other than those who have been mentioned here who have had copies [187] of this old Gaelic manuscript?

A. Do you mean for their own personal possession, or to read?

Q. Regardless of the purpose, either to read or to distribute.

Mr. Martin: If you know.

A. I have lent my copy to two persons that I can recollect, and got it back from them.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

• Q. (By Mr. Shone): Do you know of any other people?

A. No, I don't recollect any others. I have not lent it to many people because I felt that it should be only a very, very restricted number of people who should be allowed to read it, particularly in view of Mr. White's final statement on it. Despite the fact that I think a great many people would profit by it tremendously, I respect his final instructions on it.

Would it be in order for me to offer a few comments of my own?

Mr. Shone: I don't think that is for either of us to suggest. I mean, there is a regular procedure of asking and answering questions here.

I have no further questions, Mr. Martin.

Redirect Examination

By Mr. Martin:

Q. There is just one question I may ask. In any of the lendings that you made you were careful [188] to conform to restrictions that Mr. White placed upon you when he permitted you to have possession of this manuscript?

A. I always made a very definite point with regard to persons to whom I lent it, that it was not to go out of their home.

Q. And that it should be returned to you?

A. That it should be returned to me.

Q. And you were very careful about the qualifications and interests of these people whom it would

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

do them some benefit, in accordance with Mr. White's instructions?

A. That was not only Mr. White's instructions to me, which I felt obligated to carry out, but was in conformity with my convictions and any teachings I may have had.

Q. And you did carry out his instructions entirely? A. Yes.

Mr. Martin: I think that is all.

Recross-Examination

By Mr. Shone:

Q. Incidentally, this lady who did the duplicating work, was she given her copy by you directly or by Mr. White?

A. She was not given a copy for duplicating. The stencils were sent to Mrs. Duce, and Mrs. Duce asked this particular friend of hers if she would actually do the mimeograph work on the stencils.

Q. I understood you said before for the work done, [189] this work, you allowed her to keep a copy, is that your testimony?

A. I believe that is true.

Q. Who was the person that allowed her to keep the copy, you or Mrs. Duce?

A. That would have been Mrs. Duce; I had nothing to do with it. I received a copy from Mr. White and Mrs. Duce did that.

Q. And Mrs. Duce was the one who handled

this mimeograph work? A. Yes.

Mr. Shone: That is all.

Mr. Martin: All right, thank you very much.

/s/ DON E. STEVENS.

The Court: Gentlemen, does that conclude your case?

Mr. Kimmell: That concludes my case.

The Court: Do you have any rebuttal, Mr. Mullen?

Mr. Mullen: Just a moment, please, your Honor.

The Court: I thought perhaps if we take a recess, you gentlemen, both being from out of town, and giving me about 15 minutes to read the depositions, that then we can come back and I can hear any argument you wish to present, or any additional testimony.

Mr. Kimmell: You Honor, in connection with the [190] deposition of Don Stevens, there is the manuscript which Mrs. Kimmell——

The Court: That is already in. We took it away from her.

Mrs. Kimmell: No.

The Court: We will put that in. She merely identified it.

The Clerk: That is Defendant's Exhibit F in evidence.

(The document referred to was marked Defendant's Exhibit F and received in evidence.)

Mr. Kimmell: Then also the book, "The Job of Living."

The Court: You are making a very big record, gentlemen. I do not see what the materiality of the book is.

Mr. Kimmell: It is not necessary, your Honor.

The Court: I do not see any need for it.

Mr. Mullen, can you see the need for encumbering the record by giving——

Mr. Mullen: Our complaint concedes certain portions of “The Gaelic Manuscript” as appearing in this “The Job of Living.” I find no purpose, that I can see, that the copy would serve, in admitting it. However, I have no objection to it if Mr. Kimmell wishes to offer it.

Mr. Kimmell: I don’t think it is necessary, your Honor.

The Court: I do not think it is material.

Mrs. Kimmell: I would rather not put it in, myself. [191]

The Court: No one has gone through, to point out what portions appear here. This is protected by copyright by Dutton, Mrs. Kimmell, and Dutton as the publisher.

I think, however, this will bear upon the point that “Gaelic” was the personality through whom these ideas were expressed, and this book will show what was Mr. White’s own comments with the message received from “Gaelic.” I think we had better receive it.

The Clerk: That is Defendant’s Exhibit G in evidence.

(The book referred to was marked Defendant's Exhibit G and received in evidence.)

The Court: Do you wish to put on any rebuttal, Mr. Mullen?

Mr. Mullen: I think not, your Honor.

The Court: Gentlemen, we will take a recess. These depositions are very short. I can read them very rapidly. Then I will return and hear any comment you wish to make.

(Short recess taken.)

The Court: Let the record show that during the recess the court has read the depositions of Don Stevens and Ivy Oneita Duce.

I will hear any argument you care to present.

(Opening argument was made on behalf of the plaintiff by Mr. Mullen.)

(Argument was made on behalf of the defendant Susan C. [192] Kimmell by Mr. Kimmell.)

(The closing argument was made on behalf of the plaintiff by Mr. Mullen.) [193]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 25th day of January, A.D. 1951.

/s/ VIRGINIA K. PICKERING,
Official Reporter.

[Endorsed]: Filed January 31, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 49, inclusive, contain Complaint for Declaratory Judgment in Respect to Copyright Material; Answer of Defendant Susan C. Kimmell; Opinion; Findings of Fact and Conclusions of Law; Judgment and Declaration that Certain Manuscripts are not in the Public Domain, that the Defendant, Susan C. Kimmell, is the Sole Owner Thereof, and Restraining the Plaintiff from Using and Quoting from Said Manuscripts and a Certain Book Copyrighted by Said Defendant; Notice of Appeal and Designation of Record on Appeal which, together with original Reporter's Transcript of Proceedings on November 29, 1950, and original

Plaintiff's Exhibits 1 to 7, inclusive, and original defendants' exhibits A to G, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19th day of February, A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12862. United States Court of Appeals for the Ninth Circuit. Harwood A. White, Appellant, vs. Susan C. Kimmell and E. P. Dutton and Company, Inc., a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 20, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 11540-Y

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMELL, E. P. DUTTON AND
COMPANY, INC., a Corporation; DOE I,
DOE II, DOE III, DOE COMPANY, a Cor-
poration, and ROE COMPANY, a Corporation,

Defendants.

STATEMENT OF POINTS TO BE
PRESENTED ON APPEAL

I.

There is but one point to be raised upon this ap-

peal, the same being whether or not the evidence supports the trial court's findings on the question of whether or not there had been a sufficient publication of the work here involved by the author thereof prior to the claim of copyright of a portion thereof to have constituted a relinquishment of the common law rights in the work and the right to obtain a copyright thereon.

The foregoing was the single issue presented by the pleadings in the trial court and therefore all the evidence admitted is pertinent thereto. The issue was very narrow, prior publication was admitted but claimed by respondent to have been only a limited or special publication, the same was claimed by appellant to have amounted to a general publication. The question on appeal is whether or not the evidence shows the publication to have been limited and special as found by the trial court or general as contended by appellant.

Dated: March 1, 1951.

SCHAUER, RYON &
McMAHON,

/s/ THOMAS M. MULLEN,
/s/ ROBERT W. McINTYRE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 2, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE CONTENTS OF THE
RECORD TO BE PRINTED ON APPEAL
AND STATEMENT OF POINTS ON AP-
PEAL

The above-named plaintiff, having appealed from the final judgment made and entered in the above-entitled action, does hereby designate the following portions of the record, proceedings and evidence to be included in the record on appeal.

A. Pleadings:

1. Plaintiff's Complaint
2. Answer of defendant Susan C. Kimmell
3. Plaintiff's Notice of Appeal

B. Judgment:

1. Memorandum Opinion of the Court
2. Findings of Fact
3. Conclusions of Law
4. Judgment

C. Evidence:

1. The entire reporter's transcript of the evidence which contains the following:

a. Testimony of Harwood A. White (pg. 10 et seq.)

b. Testimony of W. N. McGuire (pg 31 et seq.)

c. Testimony of Susan Crandall Kimmell (pg. 108 et seq.)

d. Deposition of Margaret Oettinger (pg. 61 et seq.)

e. Deposition of Harriett W. Jones (pg. 96 et seq.)

f. Deposition of Ivy Duce (pg. 140 et seq.)

g. Deposition of Don E. Stevens (pg. 167 et seq.)

2. Exhibits admitted in evidence as follows:

a. Plaintiff's Exhibit No. 3 in evidence

b. Defendant's Exhibit "A" in evidence

c. Defendant's Exhibit "B" in evidence

d. Defendant's Exhibit "C" in evidence

3. The following items being mimeographed manuscripts and a book are too long, bulky and extended to be included in the printed record and said items not being of a nature requiring the court to read them but only to see and examine the same, appellant moves that said exhibits be held by the clerk for inspection by the court in accordance with Rule 18 of the above-entitled court.

Dated: March 1, 1951.

SCHAUER, RYON &
McMAHON,

/s/ THOMAS M. MULLEN,

/s/ ROBERT W. McINTYRE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 2, 1951.

No. 12862

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY,
Inc., a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

SCHAUER, RYON & McMAHON,
ROBERT W. McINTYRE,
THOMAS M. MULLEN,

26 East Carrillo Street,
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Santa Barbara, California,

Attorneys for Appellant.

MAY 22 1955



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No. 12862

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY,
INC., a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

I.

Statement of Jurisdiction.

A. Pleadings.

1. This action was commenced upon the filing of an action for declaratory relief by appellant. The property involved is a manuscript caused to be compiled or compiled by Stewart Edward White, now deceased, called the "Gaelic" or "Old Gaelic" manuscript.

2. The Complaint [Tr. pp. 3 to 9] alleges the compilation of the "Gaelic" manuscript by Stewart Edward White; alleges that it was given general publication without claim of copyright by the author and by two other persons with the author's consent; alleges that subsequent to the general publication the author transferred his property in

the manuscript to defendant Susan C. Kimmell together with a further manuscript called "The Job of Living" which quotes from the material in the "Gaelic" manuscript; alleges that "The Job of Living" was published by said defendant under a claim of copyright; alleges that a dispute had arisen between appellant and appellee in respect to appellant's right to use either the portion of the "Gaelic" manuscript printed in "The Job of Living" under copyright claim or the remainder thereof not so published. The prayer is for a determination of the rights of the parties in respect to the use of the entire "Gaelic" manuscript.

3. The Answer of Susan C. Kimmell, appellee herein, [Tr. pp. 10 to 15], admits the allegations of the Complaint for the most part but denies that there was a general publication of the "Gaelic" manuscript prior to assignment to her and her publication under claim of copyright of "The Job of Living." In this respect the Answer alleges that the publications mentioned in the Complaint were limited, or special publications to persons specially interested in the contents only.

B. Statutory Provisions for the Jurisdictions of the District Court and the United States Court of Appeals.

1. The basic statutory jurisdiction in the federal courts is provided by Title 17 of the United States Code relating to copyrights. Federal jurisdiction was formerly provided by Section 34 of Title 17 and is now provided by Section 1338, Title 28, United States Code.

2. The particular form of the proceedings taken here are provided for by Sections 2201 and 2202 of Title 28, United States Codes.

II.

Statement of the Case.

A. Questions Involved in This Appeal and the Manner in Which They Arise.

1. The pleadings, if they raise any issue, only raise the issue of whether or not the publications by the author and by others with his consent, specified in the Complaint, were sufficient to constitute a general publication without claim of copyright under Title 17 of United States Codes. We inject the qualification in respect to any issue being raised by the pleadings for the reason that we feel that the giving, selling and revealing of the document with only the limitation that the same be limited to persons particularly interested therein, is in itself, a general publication. However, the cause was tried on the theory that the issue was whether or not there had been a general publication and to that single issue all the evidence was addressed.

2. Upon trial and submission of the cause, the trial court, in effect, found there had been no general publication of the "Gaelic" manuscript by the author or with his consent. [Par. VII of Findings, pp. 43 and 44 of Tr.] The principal issue here is whether or not this finding is supported by the evidence.

3. There are subsidiary questions relating to specific detailed findings, these are:

a. The Court found that not more than seventy-five (75) copies of the "Gaelic" manuscript had been produced and distributed [Tr. p. 43]. This finding is not supported by the evidence.

b. The Court found that the author granted to Margaret Oettinger and Ivy Oneita Duce permission

to reproduce said manuscript, but with the limitation that the same not be distributed to the general public [Tr. p. 42]. There is no evidence to support such finding in respect to Margaret Oettinger.

c. The Court found that the distribution of copies of "Gaelic" by the author was not made without restriction as to use thereof [Tr. p. 43]. The evidence does not support this finding.

d. The Court found that it was not true that the author permitted Margaret Oettinger to reproduce said manuscript and sell the same to many persons [Tr. p. 44]. The evidence does not support this finding.

e. The Court found that it was not true that the author permitted Ivy Oneita Duce to reproduce "Gaelic" and sell the same to her friends and acquaintances [Tr. p. 44]. This finding is contrary to the evidence.

f. The Court repeatedly made purported findings of fact which are conclusions of law, by way of qualification on characterization of the effect of certain acts of reproduction and distribution of the "Gaelic" manuscript, which render said findings equivocal and insufficient [Pars. V and VII of Findings, pp. 42 and 43 of Tr.].

B. Facts.

Stewart Edward White, over the period of from the early 1920's to the early 1930's, wrote and caused to be compiled and written a certain manuscript which he called the "Gaelic" or "Old Gaelic" manuscript [Complt., Par. V, p. 4 of Tr., Ans., Par. III, p. 10 of Tr.]. This manuscript was originally produced, a small portion at a time,

from about 1923 to 1933 and the portions so produced were multiplied in about a dozen copies by ditto process and distributed to a small but not rigidly fixed group which included plaintiff [Tr. pp. 61 to 63]. In the fall of 1933 mimeograph stencils were cut and the manuscript mimeographed at the instance of Stewart Edward White [Tr. pp. 61 and 63, 79 to 81]. There were sixty (60) or seventy (70) copies made [Tr. p. 81]. W. N. Maguire was Stewart Edward White's secretary from about 1920 to the date of the death of Stewart Edward White in 1946 [Tr. p. 79]. She made up the mimeographed copies of "Gaelic" and at the request of Stewart Edward White mailed out eighteen (18) or twenty (20) copies to a list of persons furnished her by Stewart Edward White together with a letter of transmittal containing approximately the following wording:

"I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise, you are at liberty to keep it." [Tr. p. 85.]

Later, additional copies were mailed out by Maguire at the request of Stewart Edward White to additional persons with the same letter of transmittal [Tr. p. 84]. Stewart Edward White left four or five copies with Maguire which she gave to friends or clients who were interested

in the manuscript; Stewart Edward White was not acquainted with these persons [Tr. p. 86]. The balance of the copies Stewart Edward White took home to loan or distribute [Tr. p. 86]. Stewart Edward White at no time made any statement to Maguire or to anyone in her presence limiting the use to be made of "Gaelic" by persons receiving the same [Tr. pp. 85 and 86]. The distribution made was not to any group or association [Tr. p. 87]. After a little over a year Stewart Edward White had Maguire make a second run of forty (40) or fifty (50) copies which he took home and distributed [Tr. pp. 87 and 88]. The distribution by Stewart Edward White of "Gaelic" was made in part to friends and acquaintances and in part to strangers who wrote him and requested a copy. No limitation was expressed by Stewart Edward White to the donees as to the use which might be made of "Gaelic" [Tr. p. 89]. Out of the two runs Maguire mailed out between forty-five (45) and fifty-five (55) copies of "Gaelic" to all parts of the United States [Tr. pp. 89 and 90].

At the time of Stewart Edward White's death he had only two mimeographed copies of "Gaelic" left in his possession [Tr. p. 71]. After Stewart Edward White's wife's death Stewart Edward White devoted his entire time to philosophy and its dissemination [Tr. p. 69]. At first Stewart Edward White had what he called Distributing Stations for "Gaelic." That is, a small group of close friends to whom he sent the manuscript either in the ditto form or mimeographed. Also, he sent "Gaelic" to a

selected group with the understanding that they were to use it to show to other people who might be interested in the philosophy therein expressed [Tr. pp. 71 and 72]. Later Stewart Edward White abandoned the "station" idea and sent "Gaelic" out to a wide group of people all over the United States, some of whom he did not know, but who asked him for a copy with the understanding that they should read it and should show it to their friends who showed an interest in the philosophy [Tr. pp. 72 and 73]. Stewart Edward White never sold a copy of the manuscript to anyone [Tr. p. 74].

Late in 1940 or early in 1941 a Margaret Oettinger of Palo Alto, California, wrote to Stewart Edward White requesting a copy of "Gaelic." Stewart Edward White replied that he had no extra copies left. Mrs. Oettinger then wrote requesting permission to make mimeographed copies for herself. Mr. White replied that she was at liberty to do so [Tr. p. 93]. Mr. White did not place any limitations in his correspondence on the persons among whom Mrs. Oettinger might circulate the manuscript [Tr. pp. 93, 94 and 95]. Several months after permission was given by Stewart Edward White to Mrs. Oettinger to make stencils, she again wrote to Stewart Edward White asking permission to charge persons, to whom the manuscript was to be distributed, the cost of reproducing the same [Tr. p. 96]. Mr. White replied that she could do so and requested that she let him know the amount to be charged per volume [Tr. p. 96]. Mrs. Oettinger only saw Stewart Edward White twice. This occurred in the

spring of 1941 [Tr. p. 107]. The "Gaelic" manuscript was discussed by Mr. White and Mrs. Oettinger. Mr. White told Mrs. Oettinger that he had no objections to additional copies of "Gaelic" being made, no limitations were placed on the amount to be charged per copy by Mrs. Oettinger nor to whom the manuscript was to be sold. It was understood between Stewart Edward White and Mrs. Oettinger that she was to charge enough to cover the cost of materials. None of this money was remitted to Stewart Edward White [Tr. pp. 108 to 114]. Mrs. Oettinger told Stewart Edward White that she was only going to mimeograph and give the manuscript to friends and people who wanted copies. At the time, she got permission to reproduce and sell copies of "Gaelic" [Tr. p. 117]. However, as time went on she sold copies to strangers some of whom were referred to her by Stewart Edward White and were strangers to him also [Tr. p. 127]. Mrs. Oettinger ran off three mimeograph reproductions of "Gaelic" each run averaging about forty (40) copies and the total amounting to about one hundred and twenty copies [Tr. p. 131]. The first two runs were sold by her at \$2.00 per copy and the last run at \$1.50 per copy because the stencils had deteriorated and the copies were not very clear [Tr. pp. 131 and 132]. Orders came through Stewart Edward White, through Mrs. Kimmell (appellee herein) and from persons who had seen a copy and wanted one [Tr. p. 127]. Sometime in 1943 Stewart Edward White granted permission to one Ivy Oneita Duce to reproduce "Gaelic" and dispose of the copies to a few of her friends at cost, and, according to her testimony,

she was cautioned by Stewart Edward White to use extreme care to prevent the document from falling into the hands of any unscrupulous persons who might “steal” the material [Tr. p. 185]. Ivy Oneita Duce is the head of the SUFI Order in the United States and has pupils in New York and throughout the country. All mimeograph publications were made without claim of copyright [Pltf. Ex. “f” in Evidence]. During his lifetime Stewart Edward White wrote another manuscript which he called “The Job” or “The Job of Living” in which he quoted portions of “Gaelic.” This manuscript he transferred to appellee together with the “Gaelic” manuscript and others [Deft. Ex. B] shortly before his death. Appellee published “The Job of Living” in book form after the death of Stewart Edward White under a claim of copyright in herself [Deft. Ex. G, Complt., Tr. p. 5, Ans. Tr. p. 11]. Stewart Edward White died in 1947 and a dispute arose between appellant and appellees in respect to appellant’s right to use and publish parts of the “Gaelic” manuscript which had and parts which had not been published in “The Job of Living.” The dispute resulted in this litigation.

III.

Specification of Errors.

1. The primary error committed by the trial court is the finding from the evidence that there had been no general publication of "Gaelic" by the author or with his permission prior to publication of "The Job of Living." The evidence does not support such a finding, but, to the contrary, shows conclusively that there had been a general publication.

2. The court erred in finding that not more than seventy-five (75) copies of "Gaelic" were produced and distributed. The evidence shows more than two hundred (200) copies distributed.

3. The court erred in finding that Stewart Edward White instructed Margaret Oettinger not to distribute "Gaelic" to the general public upon giving her permission to reproduce and sell the same. There is no evidence to support this finding.

4. The court erred in finding that distribution of "Gaelic" was not made by the author without limitations upon the distributees as to its use. The evidence is contrary.

5. The court erred in finding that the author did not give one Ivy Oneita Duce permission to reproduce "Gaelic" and sell it to her friends and acquaintances. The evidence shows that he did.

6. The court erred in making findings which are equivocal and insufficient to meet all of the issues in this cause. The findings are in many instances conclusions and not factual in their content.

IV.

Argument.

A. Acts of the Author.

There is no real question in respect to the author's own activities in publishing the "Gaelic" manuscript without claim of copyright.

The first distribution in the ditto copies from 1923 to 1933 probably did not constitute a general publication. However, there can be no real question but that Stewart Edward White intended to and did publish "Gaelic" freely and without reservation from 1933 to his death. The only possible motive the author could have had under the circumstances shown by the evidence in multiplying and distributing the "Gaelic" manuscript and consenting to its multiplication and distribution as he did, was its publication. Stewart Edward White was not the head of or even a member of any spiritualistic organization; he was not the head of or even a member of any philosophical group or organization; nor was he trying to promote or foster any particular ideas. No motive is discernable from the evidence on the part of Stewart Edward White in publishing and permitting the publication of the "Gaelic" manuscript other than a desire to have people read the document. The distribution of the manuscript was not made in connection with any business or profession or any other primary activity. As before stated, the sole motive behind the reproduction and wide distribution of the mimeographed books was publication.

Stewart Edward White's attitude is perhaps epitomized by the following quotation from his letter of May 18, 1945, to Margaret Oettinger [Pltf. Ex. 3, Tr. p. 92]:

"As to the Gaelic, Sue Kimmell is quite right in saying that you may go ahead at your discretion with more copies of it. And your friend, Barbara Delkin, got the wrong impression. I have no objection whatever to the distribution of copies of Gaelic, provided, of course, it is not in published form."

Also his intent and attitude is indicated by the contents of the letter of transmittal that went with copies of "Gaelic" mailed to numerous individuals [Tr. p. 85].

"I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise, you are at liberty to keep it."

The paragraph first above quoted was written by Stewart Edward White with full knowledge of what Mrs. Oettinger was doing, it is an express authorization to Mrs. Oettinger to go ahead with *more* copies of "Gaelic" at her *discretion*. The only limitation is that it is not to be put out in published *form*. There is not the slightest suggestion of any limitations on the *persons* to whom the manuscript was to be sold or the *number* of copies to be made by Mrs. Oettinger. While there is a limitation as to form, it must be borne in mind that Stewart Edward White was entirely cognizant of the form used both by himself and Mrs. Oettinger, at the time the letter was

written, and by its terms ratified past publication in that form and authorized further publication in that form.

The record further indicates that at the time Stewart Edward White gave permission to Mrs. Oettinger to make the "first run" of "Gaelic" she was a stranger to him and merely wrote him asking permission [Tr. pp. 92-94]. Later she saw him twice and upon the first occasion only was "Gaelic" discussed and that discussion related to making further copies of "Gaelic" [Tr. pp. 107-111].

The record indicates that Stewart Edward White did not wish to publish "Gaelic" as a conventionally printed book. He gave various reasons for this: He felt that his wife's work in this field was more important and should have precedence [Tr. p. 66]; that it was not in proper form for a book [Tr. pp. 134 and 171]; that he had been instructed by the Invisibles not to print it because of the war [Tr. p. 182]; that the Invisibles had instructed him not to publish "Gaelic" [Tr. p. 206]. Stewart Edward White was, however, happy to have Mrs. Oettinger mimeograph "Gaelic" and sell it and pass it about [Tr. p. 141].

B. Acts of Other Parties.

Margaret Oettinger mimeographed about one hundred twenty (120) copies of "Gaelic" and sold them to various persons at \$2.00 and \$1.50 per copy [Tr. pp. 118-119]. This was done with the consent of the author and with his active assistance. Stewart Edward White himself referred people who wished a copy to Mrs. Oettinger, some of which customers were friends and some strangers [Tr. pp. 127-128]. This certainly constituted a general publication by any standard.

Ivy Oneita Duce, the now recognized head of the SUFI Order in America, with Stewart Edward White's consent, borrowed the Oettinger stencils and ran off a few copies of "Gaelic" which she sold at cost to a few friends. According to Mrs. Duce's testimony she was cautioned by Stewart Edward White to use extreme care not only in respect to whom she gave a copy but also in respect to whom she even allowed to see it [Tr. pp. 184-185]. This extreme caution on the part of Stewart Edward White also appears in the testimony of appellee and one Don E. Stevens. However, it is to be noted that all the testimony of Kimmell, Duce and Stevens relating to the great care that should be exercised by them not to do any act that would constitute a publication and the extreme caution that they should use to prevent the manuscript from falling into the hands of unscrupulous persons who might "steal" from it, relates only to their own activities. None of the testimony of these three witnesses has, nor does it purport to have, any bearing on the Oettinger publication nor on the publication by the author himself. Mrs. Duce herself was virtually a stranger to Stewart Edward White as was Mrs. Oettinger. If Stewart Edward White was so concerned about the possibilities of "stealing" from the manuscript or loss of exclusive rights to it his behaviour in permitting them to reproduce the manuscript at all was strange indeed. Also, his attitude expressed to Mrs. Kimmell, Mrs. Duce and Mr. Stevens, according to their testimony, contrasts violently and strangely with that in his letters to and conversations with everyone else. There are two possible explanations. Perhaps Stewart Edward White was dubious in respect to "Sufies" or it is colored by bias and a desire to prevent the Appellant's use of the material.

In respect to the latter possibility it is to be noted that near the end of Stewart Edward White's life he and his brother, Appellant, fell into something of a controversy over the interpretation to be placed upon "Gaelic" [Defts. Ex. C]. Appellee joined in this controversy on the side of Stewart Edward White and drew to herself, after the death of Stewart Edward White, the support of Mrs. Duce and Mr. Stevens in active opposition to Appellant's use of the material. The testimony of this little coterie very probably is strongly colored by the controversy mentioned [Tr. p. 166]. Again we point out that the testimony of Kimmell, Duce and Stevens has no bearing on the activities of Stewart Edward White and Mrs. Oettinger in publishing "Gaelic." Assuming that the trial court believed every word of the testimony of Kimmell, Duce and Stevens we still have the unrefuted publication of "Gaelic" by the author and Mrs. Oettinger.

We believe that the basis for the trial court's decision may be gleaned from the following quotations from the record:

"The Court: In fact, I have done it myself. I have copyrighted lectures, when I was on the Extension Division, when I talked all over the State of California. For instance, I copyrighted a lecture I used to give on the defenses on the law of libel, and afterwards I was able to incorporate it in my first book on libel, and then in my second book, which I published this year." [Tr. p. 55.]

"The Court: All of us have pet ideas and spread them among people that might be interested in the thoughts we express.

The Witness: It is something like that.

The Court: If that were not so, some of us would not devote \$1,000.00 worth of time to give a speech for which we do not even get paid.” [Tr. pp. 73 and 74, Testimony of Harwood White.]

**C. Particulars in Which the Findings
Are Unsupported.**

**1. FINDINGS ON THE NUMBER OF COPIES MADE AND
DISTRIBUTED.**

A startling discrepancy between the evidence and the findings is set forth at the end of paragraph V of Findings [Tr. p. 43]. Here the court finds that the combined efforts of Stewart Edward White, Margaret Oettinger and Ivy Oneita Duce resulted in not more than seventy-five (75) mimeographed copies of “Gaelic.” The record, as has been before pointed out, shows a minimum of at least two hundred copies and the probability that the number approached three hundred.

**2. FINDINGS THAT PUBLICATION BY MRS. OETTINGER
WAS LIMITED AND RESTRICTED.**

Here the court found that the publication of “Gaelic” by Stewart Edward White, Mrs. Oettinger and Mrs. Duce was not to the general public but only to friends and persons particularly interested in the *teachings* of Stewart Edward White and in his philosophy. In the first place there is no evidence whatever that Stewart Edward White had any “Teachings” or in any way was promoting any particular idea in handing out copies of “Gaelic.” In the second place it must be remembered that the manuscript, “Gaelic,” does not purport to be nor did Stewart

Edward White represent it to be, the product of his mind. "Gaelic," the spirit of an individual who had departed this world and become an invisible non-material entity, communicated the ideas to a group of persons and these communications were written down by various individuals present and were saved and collected by Stewart Edward White. If any "teachings" were being advanced they were the "teachings" of "Gaelic," not Stewart Edward White. In the third place the record clearly shows that Stewart Edward White distributed copies to strangers, whose only qualification was that they asked for a copy, and permitted Mrs. Oettinger to do the same and collect \$2.00 a copy. Also, he transmitted copies to friends and requested that they circulate it among their friends and their friends' friends, etc. The only motive Stewart Edward White had in requesting the return of any copy was to start it in circulation again. The court ignores everything Stewart Edward White actually did, ignores that which he permitted Mrs. Oettinger to do and assisted her in doing, and adopts the testimony of Kimmell, Duce and Stevens which only purported to bear upon their relations with Stewart Edward White as applying to Stewart Edward White's own activities and those of Mrs. Oettinger. Actually the record shows that Stewart Edward White had been circulating "Gaelic" for nearly twenty years before he even knew of Kimmell, Stevens and Duce.

These witnesses had no knowledge and in fact professed no knowledge of Stewart Edward White's activities or Mrs. Oettinger's activities in connection with the reproduction, circulation and sale of the "Gaelic" manuscript.

3. THE FINDINGS ARE NOT ONLY CONTRARY TO THE EVIDENCE BUT ARE SO TECHNICALLY INADEQUATE THAT THEY DO NOT CONSTITUTE FINDINGS OF FACT ON THE ISSUES RAISED.

The state of the Findings of Fact obviously arises from an attempt on the part of the court to avoid the effect of evidence which cannot be disputed or was admitted to be true. For instance, defendant Susan C. Kimmell testified that Mrs. Oettinger reproduced "Gaelic" and sold copies at \$2.00 each [Tr. p. 175]. Nowhere in the record is there any attempt even to refute the Maguire testimony relative to Stewart Edward White's circulation of "Gaelic." The attempt in the Findings is to characterize the admitted facts by conclusions of law in such a way as to avoid the effect of the facts. This process commences in paragraph V of Findings [Tr. p. 42]. The words "teachings of Stewart Edward White" are inserted with no foundation therefor in the record. The Finding sets forth the reproduction and circulation of "Gaelic" by Stewart Edward White, Mrs. Oettinger and Mrs. Duce but attempts to qualify it by stating that distribution was only to persons particularly interested in the contents and the teachings of Stewart Edward White and was not to the general public. What is a "person particularly interested in the contents"? Nowhere do the Findings state what such a person is or what his qualifications might be. Outside of our educational institutions persons seldom read any literature if they are not interested in the contents. The Findings then set forth that the distribution was "not to the general public without discrimination as to persons." What discrimination was exercised as to persons? Friends and interested persons? Whose friends? What constituted one a friend? Apparently from the record anyone who

asked Stewart Edward White for a copy or expressed admiration for "Gaelic" was a friend. Who and what were Maguire's friends, Oettinger's friends, friends of friends of Stewart Edward White? What is meant by general public? Distribution to only a small part of the general public constitutes publication.

The evasive and equivocal nature of the Findings reaches its acme in paragraph VII [Tr. p. 43]. This paragraph constitutes no finding at all. It starts out with the recitation that the allegation that Stewart Edward White distributed copies to more than eighteen (18) persons without reservations as to use, etc., is not true—a finding that distribution was not made to more than eighteen (18) persons does not meet the issues. Distribution to one, two, three or four persons could and may have constituted general publication. The Finding then goes on to recite that the allegation in the complaint relative to circulation by Stewart Edward White does not constitute a general publication. It is hard to say just what the court means by this remarkable assertion. Of course, no one claims that paragraph IX(1) of the complaint was a general publication, the only alternative interpretation is that the allegations referred to, if taken as true, would not constitute a general publication. Such is not a finding but would be in the nature of a ruling on the sufficiency of the pleading referred to. Reference to paragraph IX(1) of the complaint [Tr. p. 6] will show that the allegation, if true, would constitute publication.

The court then finds as to the allegations in paragraph IX(2) of the complaint that such allegations relating to Stewart Edward White's permitting many persons to borrow the manuscript and to read and loan it is not true insofar as "many persons" implies the general public,

and that the allegations do not constitute a dedication to the general public. Again this is no finding of fact but is a comment on the pleading and its sufficiency.

The court finds, in relation to paragraph IX(3), that the allegation that Stewart Edward White permitted Mrs. Oettinger to reproduce and sell a large number of copies "is not true," of course, the court in paragraph V of the Findings, finds that Stewart Edward White did permit Mrs. Oettinger to reproduce and sell "Gaelic" and the evidence without dispute so shows. It may be that the court is merely negating sale of a "large number of copies." If so, the Finding is inadequate for the reason that sale to one person of one copy is publication. The court further finds that the allegation of sale to various persons of a large number of copies does not constitute publication. Of course, the fact of sales of copies would unquestionably constitute publication.

The court finds, in relation to paragraph IX(3), that the allegations that Mrs. Duce was permitted by Stewart Edward White to reproduce and sell some copies to her friends and acquaintances is not true. The court found in paragraph V that Mrs. Duce did reproduce and sell the manuscript to her friends and acquaintances and the evidence so shows. The court then goes on to find that the allegations do not constitute a dedication, etc. The allegations, if taken as true, do constitute publication and the court's comments on the allegations do not constitute any finding of fact. Probably the intent of the court in making the findings filed was to make findings that publication was had but was only made to friends and persons interested. Even giving the findings the benefit of such an assumption they fall far short of adequacy. Persons particularly interested in the subject matter without any

further qualification does not constitute any classification or limitation on publication whatever. The limitation to "friends," without specifying whose friends and without any indication as to what constituted anyone "a friend," is also totally inadequate.

D. The Law.

1. PUBLICATION WITHOUT CLAIM OF COPYRIGHT CONSTITUTES A DEDICATION TO THE PUBLIC AND A WAIVER OF THE RIGHT TO CLAIM A COPYRIGHT.

We believe there is no dispute whatever upon this point and we will not labor it.

U. S. C. Title 17, Sections 9, 10, 11;

Universal Film Mfg. Co. v. Copcrman, 212 Fed. 301; 218 Fed. 577; 235 U. S. 704; 59 L. Ed. 433;

Basevi v. Edward O'Tool Co., 26 Fed. Supp. 41; 18 C. J. S. 198;

18 C. J. S. 150.

2. THE INTENT OF THE WRITER IS A FACTOR IN DETERMINING WHETHER OR NOT THERE HAS BEEN A GENERAL PUBLICATION BUT IS NOT CONTROLLING.

Waring v. WDAS Broadcasting Station, 194 Atl. 631, 327 Pac. 433;

Werkmeister v. American Litho. Co., 134 Fed. 321.

3. CIRCULATION OF LITERARY PROPERTY CONSTITUTES PUBLICATION.

D'Ole v. Kansas City Star, 94 Fed. 840.

4. WHENEVER AN UNRESTRICTED PORTION OF THE GENERAL PUBLIC HAS ACCESS TO A WORK WITHOUT FURTHER ACTION ON THE PART OF THE AUTHOR, A PUBLICATION OCCURS.

Kurfiss v. Cowherd, 121 S. W. 2d 282;

Van Veen v. Franklin Knitting Mills, 260 N. Y. Supp. 163.

5. UNRESTRICTED SALE OF A SINGLE COPY CONSTITUTES A PUBLICATION.

Bobbs Merrill Co. v. Straus, 147 Fed. 15, 210 U. S. 339, 52 L. Ed. 1086.

6. THE TESTIMONY OF A CREDIBLE WITNESS, WHICH IS UNIMPEACHED, MAY NOT BE IGNORED.

Twentieth Century Fox v. Deickhaus, 153 F. 2d 893.

7. THE PUBLICATION SHOWN BY THE RECORD WAS NEITHER LIMITED NOR PRIVATE, BUT TO THE CONTRARY, WAS GENERAL.

- a. *Time element*. Certainly the period of time over which circulation occurred is an element. The time "Gaelic" was circulated was from 1923 to 1946. There is no dispute in this respect. From 1933 to 1946 it was circulated in bound mimeograph form.
- b. *Actual declarations by the author*. In three places in the record the author declares himself in respect to circulation of "Gaelic."

1. In 1933 Stewart Edward White sent out copies of "Gaelic" with a letter reading substantially as follows:

"I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise, you are at liberty to keep it."

2. In 1940 he wrote to appellee using the following language:

"Just a hasty note, before you do any work copying Gaelic. Yesterday afternoon some people were here from Palo Alto who are so stuck on Gaelic that they want to copy it in mimeograph. They asked (a) whether I was willing; (b) if so, would I mind their pass—it around among such of their friends who want copies, (c) if so, again, whether I would mind their charging such people the exact cost. I approved. So, if you write them, you might get one of those copies. Name: Mrs. Frank Oettinger, RFD #1, Menlo Park, Cal." [Tr. pp. 30 and 31.]

3. In 1945 he wrote to Mrs. Oettinger as follows:

"As to the Gaelic, Sue Kimmell is quite right in saying that you may go ahead at your discretion with more copies of it. And your friend, Barbara Kelkin, got the wrong impression. I have no objection

whatever to the distribution of copies of Gaelic, provided, of course, it is not in published form.” [Tr. p. 31.]

Granted the circulation letter of 1933 went to friends of Stewart Edward White but his friends are requested to pass the manuscript around among their friends and at least, impliedly, his friends' friends are permitted to pass it on to their friends. There was no limitation in the letter. The letter of 1940 states that he has consented to an indefinite group of persons reproducing “Gaelic” and for the cost of production to sell it to such of their friends that want it. The letter of 1945 authorized Mrs. Oettinger to go ahead with further copies of “Gaelic” and the only reservation is that it not be in published *form*. The trial court treated this as an express reservation of publication rights. [Tr. p. 31.] It isn't, of course, it is only a restriction on the form of publication. But suppose, for purposes of argument, we assume he had instructed Mrs. Oettinger as follows: “You may make and distribute copies of ‘Gaelic’ at your discretion, charging cost of production for each copy, but I reserve all rights of publication.” We submit that under the law of copyright one may not eat his cake and have it too and the authorization to reproduce and sell at the discretion of the reproducer is a general publication where the authority is acted upon as it was here. The attempted reservation of rights of publication would be a nullity.

8. THERE IS NO AUTHORITY WHICH SANCTIONS THE EXTENT OF PUBLICATION SHOWN BY THE EVIDENCE HERE AS A PRIVATE OR RESTRICTED OR LIMITED PUBLICATION.

We know of no case which permits an author to go to the extremes that are shown by the evidence here and still claim a composition to be his literary property for purposes of copyright or any other purpose, either under the law of copyright or the common law rules governing rights in unpublished works. We find nothing in the authorities cited by the court which supports the decision and we challenge appellee to produce any authority whatsoever which goes to such extremes.

The decision should be reversed.

Respectfully submitted,

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No. 12862

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY,
Inc., a corporation,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

I.

Statement of Jurisdiction.

It is submitted that the Statement of Jurisdiction appearing in appellant's opening brief is so loose and general, except as to statutory provisions, as to be inadequate. Therefore appellee submits a Statement of Jurisdiction as follows:

A. Pleadings.

1. In this action appellant seeks a declaration that a certain manuscript entitled "Gaelic" or "Old Gaelic" and a certain book entitled "The Job of Living," based upon the said manuscript and in which portions of said manuscript are quoted, are in the public domain and may be quoted without infringement of the copyright claimed

by appellee on said book or her common law proprietary rights claimed by her in said manuscript. Appellee resists on the ground that she has a statutory copyright on said book and is the owner of both said book and said manuscript and the material therein, and seeks a declaration to that effect, and an injunction restraining appellant from using or quoting from said book or said manuscript.

2. The Complaint [Tr. pp. 3-9] alleges that between the early 1920s and the early 1930s Stewart Edward White compiled or caused to be compiled a manuscript designated as "Gaelic" or "Old Gaelic"; that prior to his death in 1947 Stewart Edward White also wrote a manuscript called "The Job" or "The Job of Living" based upon the "Gaelic" manuscript and quoting portions thereof; that on October 20, 1944, Stewart Edward White transferred to appellee Susan C. Kimmell his right, title, and interest in the "Gaelic" manuscript and also in "The Job" manuscript; that in 1948 appellee Kimmell, through E. P. Dutton & Company, Inc., published said manuscript "The Job" in book form under the title "The Job of Living" and copyrighted the same in her name; that prior to 1944 Stewart Edward White abandoned the "Gaelic" manuscript to the general public by reproducing and distributing copies himself and permitting others to do the same without limitation as to use or right to republish and without notice or claim of copyright; that appellant is writing a book based upon the "Gaelic" manuscript and proposes to quote therefrom and from the copyrighted book "The Job of Living"; that appellant proposes to publish and sell his book to the general public; that a con-

troverſy has ariſen between appellant and appellee with reſpect to right of appellant to quote from the “Gaelic” manuſcript and from the book “The Job of Living.” The prayer is for a determination and declaration as to the rights of the parties involved in ſaid controverſy.

3. The Answer [Tr. pp. 10-15] admits the compilation of the “Gaelic” manuſcript by Stewart Edward White; admits that prior to his death the ſaid Stewart Edward White wrote a manuſcript called “The Job” which is baſed upon the “Gaelic” manuſcript and contains quotations therefrom; admits that on October 20, 1944, Stewart Edward White transferred to appellee his right, title, and intereſt in the “Gaelic” manuſcript and in “The Job” manuſcript; admits that during the year 1948 appellee, through E. P. Dutton & Company, Inc., printed, published and ſold to the general public “The Job” manuſcript in book form under the title “The Job of Living” and copyrighted the ſame; denies that prior to the year 1944, or at any other time, Stewart Edward White dedicated and abandoned the “Gaelic” manuſcript to the general public by the acts alleged or otherwiſe; and alleges that the reproducing, lending and diſtribution of ſaid manuſcript by himſelf and others was a limited and qualified publication. The prayer is that appellant be reſtrained and enjoined from uſing or quoting from the “Gaelic” manuſcript or from the book “The Job of Living.”

B. Statutory Proviſions for the Jurisdiction of the Diſtrict Court and the United States Court of Appeals.

Statement of appellant is adopted by appellee.

II.

Statement of the Case.

It is further submitted that the Statement of the Case set forth in appellant's opening brief is lacking in clarity and conciseness. Therefore appellee submits her Statement of the Case as follows:

A. Questions Involved in This Appeal and the Manner in Which They Arise.

1. The issue raised by the pleadings is whether copies of the "Gaelic" manuscript in mimeographed form were made available by Stewart Edward White and by others, with his consent, to the general public without discrimination as to persons, or were available only to definitely selected individuals or a limited, ascertained class. On this issue hangs the validity of the copyright of appellee on the book "The Job of Living."

2. The trial court found that the reproduction and distribution of the "Gaelic" manuscript amounted to a limited and restricted publication; that there was no general publication thereof, and that said manuscript was not in the public domain.

3. It is further submitted that the specific, detailed findings, in all respects of vital importance, are amply supported by the evidence.

B. Facts.

1. The pertinent facts, stated briefly, are as follows:
 - a. The “Gaelic” manuscript was compiled by Stewart Edward White [Tr. pp. 62-63].
 - b. “The Job” manuscript was written by Stewart Edward White based on “Gaelic,” and portions of “Gaelic” are quoted therein [Complaint, Par. V, p. 5 of Tr.].
 - c. The manuscripts of “Gaelic” and “The Job” were transferred to appellee by Stewart Edward white on October 20, 1944 [Complaint, Par. V, p. 5 of Tr.].
 - d. Stewart Edward White died September 18, 1946 [Tr. p. 149].
 - e. “The Job” manuscript was written by Stewart Edward White prior to his death [Complaint, Par. V, pp. 4-5 of Tr.], and the book “The Job of Living” was published after his death [Complaint, Par. VI, p. 5 of Tr.].
 - f. “The Job” manuscript was published in book form by appellee under the title “The Job of Living” and copyrighted by her in 1948 [Complaint, Par. VI, p. 5 of Tr.].
 - g. Stewart Edward White had copies of the “Gaelic” manuscript made by hectograph (Ditto process) [Tr. pp. 61-63] and by mimeograph [Tr. pp. 80-81].
 - h. Margaret Oettinger, with permission of Stewart Edward White [Defendant’s Exhibit “A,” Tr. p. 108], also made additional mimeographed copies of “Gaelic” [Tr. pp. 114-116].

i. Ivy Duce, with permission of Stewart Edward White made additional mimeographed copies of "Gaelic" [Tr. pp. 184-185].

j. W. N. Maguire was an employee of Stewart Edward White [Tr. p. 79].

2. With reference to the number of copies of the "Gaelic" manuscript distributed as distinguished from the number produced:

a. Appellant states that he distributed 30 to 50 [Tr. p. 77].

b. Witness Maguire states that she distributed 45 to 55 [Tr. p. 90].

c. Witness Oettinger makes no statement as to a definite number distributed, but from statement as to charges made for copies in the different "batches" mimeographed by her it might be inferred that she distributed 70 to 100 [Tr. pp. 131-133].

d. Witness Duce states that she distributed copies to Don Stevens, Mrs. Cuthbert, Mrs. Ahlstrand, Mrs. Simpson, one to Stewart Edward White and two to Mrs. Oettinger, or two to Stewart Edward White and one to Mrs. Oettinger—seven in all [Tr. p. 186].

Total number distributed (not including numbers fixed by inference) 82 to 105.

3. With reference to the persons to whom copies of the "Gaelic" manuscript were distributed:

a. By appellant: to persons selected by him [Tr. p. 77].

b. By W. N. Maguire: to list of persons selected by Stewart Edward White [Tr. pp. 82 and 84] and to four or five of her friends interested in Stewart Edward White's work [Tr. p. 86].

c. By Margaret Oettinger: to persons designated by Stewart Edward White, to two or three of her own friends [Tr. p. 109], and in compliance with requests from Stewart Edward White, Katherine Benner, and appellee [Tr. p. 128].

d. By Ivy Duce: to persons known to Stewart Edward White [Tr. p. 186].

4. With reference to copies of the "Gaelic" manuscript not being available to the general public in public libraries, etc.:

a. Appellant states that Stewart Edward White did not place a copy in public library and that no copy or copies appeared on the shelves of a retail bookseller [Tr. p. 74] and that no copy or copies were in an established commercial lending library [Tr. p. 76].

b. Witness Maguire states that no copy or copies were deposited in a public library or libraries, or on the shelves of a retail book store, or in a commercial lending library [Tr. p. 101].

c. Witness Oettinger states that she did not place a copy in a public library [Tr. p. 133].

d. Witness Jones states that no copies were available to the general public in any retail book store or public library [Tr. p. 146].

e. Appellee states that she does not know of any copy or copies in public libraries, retail book stores, or commercial lending libraries [Tr. p. 173].

f. Witness Duce states she has no knowledge of copies being in a public or rental library, and that no copies were offered for sale by anybody [Tr. p. 186].

g. Witness Stevens states that Mrs. Duce did not sell copies at retail or through retail outlets and did not place them in a lending library [Tr. p. 213].

5. With references to limitations on distributees as to use of the "Gaelic" manuscript.

a. Stewart Edward White stated in substance—I was willing that they pass copies of the manuscript around among such of their friends who want copies [Defendant's Exhibit A].

b. The appellee states: "he (Stewart Edward White) wanted it guarded very carefully and shown only to people who were particularly interested in the subject and in whose discretions—or whose discretion could be relied on, who would not copy any portions of it or produce any portions for publication [Tr. p. 159].

c. Ivy Duce states: "He (Stewart Edward White) said that it was perfectly all right for me to make a few copies, but they were to be limited and that I was only to allow a few of my close friends to see them, that I must be very careful in fact to whom I showed them, because since they had not been published anybody . . . could steal the material [Tr. pp. 184-185].

d. Don E. Stevens states: "I always made a very definite point with regard to persons to whom I lent it, that it was not to go out of their home" [Tr. p. 222].

III. Argument.

The law has consistently distinguished between general publication and limited publication of products of the mind. The question of when there has or has not been one or the other has been before the courts many times. An early case, cited in the Opinion of the trial judge [Tr. p. 20, reference (7)], *Werkmeister v. American Lithographic Company*, 134 Fed. 321 at 326, states the general rules for distinguishing between these two kinds of publication as follows:

“The result of an examination of the authorities seems to show that the following propositions are established: a general publication consists in such a disclosure, communication, circulation, exhibition or distribution of the subject of copyright, tendered or given, to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public. Prior to such publication, a person entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals or a limited, ascertained class or he may expressly or by implication confine the enjoyment of such subject matter to some occasion or definite purpose. A publication under such circumstances is a *limited* publication and no rights inconsistent with or adverse to such restrictions are surrendered. Restrictions imposed upon the use prior to publication protect the copyright. . . . The nature of the subject matter, the character of the communication, circulation or exhibition and the nature of the rights secured are chiefly determinative of the question of publication.”

In another case, also cited in the Opinion [Tr. p. 20 reference (6)], *American Tobacco Company v. Werkmeister*, 207 U. S. 284 at 299, the Supreme Court summarizes the principles above-quoted from *Werkmeister v. American Lithographic Company* as follows:

“ . . . the property of an author . . . in his intellectual creation is absolute until he voluntarily parts with the same. *One* or *many* persons may be permitted to an examination under circumstances which show no intention to part with the property right, and it will remain unimpaired.” (Emphasis added.)

To constitute general publication the work must be made available in some manner and in some place to the general public without discrimination as to persons, so that any member thereof who chooses may have access thereto. There must be no restrictions of any kind imposed by the author. Whether or not the members of the general public take advantage of the opportunity thus offered is beside the point. As is said in *Jewelers Mercantile Agency v. Jewelers Weekly Publishing Company*, 49 N. E. 872 at 875 also cited in the Opinion [Tr. p. 20 reference (7)]:

“The act of publication is the act of the author and cannot be dependent upon the act of the purchaser.”

If any sort of express or implied restrictions are imposed, the result is a limited publication, and the author does not lose his property in the subject of such limited publication.

It is submitted that the effect of the production and distribution of copies of the “Gaelic” manuscript must be determined according to the foregoing principles.

A. Acts of the Author.

The attitude of Stewart Edward White with regard to publication of the "Gaelic" manuscript is most convincingly shown by the following quotation from the testimony of appellant concerning a conversation he had had with Stewart Edward White:

"He said that he felt that Betty's work should hold the center of the stage and was more important, and he had a number of other books he wanted to get out of hers, that he had in mind. That, therefore, he didn't want to inject himself. He was always very reticent about his own work. He thought hers was more important." [Tr. p. 66.]

Since Stewart Edward White was a professional writer with established publishing connections and had already written and published a number of books dealing with the same general subject matter covered by the "Gaelic" manuscript [Tr. p. 152], there can be no mistaking what he meant when he said that he did not want to publish the "Gaelic" material in book form. Why did he not take the very obvious, convenient, and customary method of making it known to the general public? The answer is, of course, that he did not want the general public to have it.

Also, the following quotation from the testimony of Margaret Oettinger is revealing as to the author's attitude toward publication:

"Mr. White said he had no objection to further copies being made. At that time he was not at all sure that he would ever publish it. He thought that

it was not necessary to publish it by itself. He had quoted from it in various books, and he thought it would be all right if we made some mineographed copies." [Tr. pp. 108-109.]

* * * * *

"As I understand it, he said, 'I don't know if I will ever publish it.' Or something like that." [Tr. p. 117.]

Referring to Plaintiff's Exhibit "3" there is no question as to what Stewart Edward White meant when he wrote as follows to Mrs. Oettinger:

"I have no objection whatever to the distribution of copies of Gaelic, provided, of course, *it is not in published form.*" (Emphasis added.)

In the same paragraph this statement occurs: "You may go ahead at your discretion with more copies of it." The word "discretion" clearly implies that a limitation had been placed upon Mrs. Oettinger; had there been no limitation there would have been no need for discretion.

The first paragraph of Defendant's Exhibit "A" clearly shows the determination of Stewart Edward White that distribution was to be limited to "... such of their friends who want copies." This determination is reflected in the way in which he handled the reproduction and distribution of copies of the "Gaelic" manuscript. The testimony of Ivy Duce [Tr. pp. 186-187] and also of Don Stevens [Tr. pp. 205-206, 210, 212] and that of appellee [Tr. pp. 159-160] conclusively indicates the frame of mind of Stewart Edward White with reference to the manuscript, namely, that except for such parts as he had already quoted in "The Job" manuscript, it was not to be made available to the general public.

B. Acts of Other Parties.

Margaret Oettinger distributed copies only to persons whose names were furnished by Stewart Edward White, Katherine Benner, and appellee, and to two or three of her own friends. Ivy Duce distributed a total of seven copies to Stewart Edward White, Mrs. Oettinger, and four personal friends. It is impossible to imagine how such distribution could be construed as a publication to the general public.

Mrs. Oettinger admits that during a conference with Stewart Edward White she “made some kind of remarks about ‘Of course we will just mimeograph it and distribute it at—or to friends,’ or something like that. ‘Give these people that want copies.’ It wasn’t—the whole thing was so informal that it is hard to remember even.” [Tr. p. 117.] Later, she states that there was no limitation by Stewart Edward White with respect to her distribution [Tr. pp. 119, 135]. These statements are in such conflict with each other and, in part, with those of Stewart Edward White as set forth in Defendant’s Exhibit “A” that one can but wonder how she could be so accurate in her memory of certain details, such as calling Stewart Edward White on the telephone, asking him if he had any objection to copies being made, and being invited by him to his home to discuss the matter [Tr. p. 121], and so vague in her recollection of the essential details of a very simple arrangement made between them. Attention is called to the fact that Defendant’s Exhibit “A” is a written record made the next day after the conference at which Mrs. Oettinger received permission from Stewart Edward White to reproduce and distribute copies of the manuscript to “such of their friends who want copies,” and for that reason is hardly likely to contain errors arising from a lapse of memory.

On page 15 of appellant's Opening Brief, referring to a controversy between Stewart Edward White and appellant with respect to the "Gaelic" manuscript, the statement is made that appellee "drew to herself, after the death of Stewart Edward White, the support of Mrs. Duce and Mr. Stevens in active opposition to appellant's use of the material. The testimony of this little coterie very probably is strongly colored by the controversy mentioned." This conclusion can be dismissed as idle speculation not supported by the least scintilla of evidence.

At this point it might be asked why W. N. Maguire appears so acquiescent and cooperative with respect to the efforts of appellant to circumvent the express desire of her former employer, Stewart Edward White, that neither his brother, the appellant, nor any one else should make the "Gaelic" manuscript available to the general public. It is very clear from Defendant's Exhibit "C" that Stewart Edward White did not want appellant to have anything to do with this manuscript. Is there not justification for asking the question, Is the testimony of Mrs. Maguire free from bias?

The evidence shows that mimeographed copies of the "Gaelic" manuscript were distributed to persons selected by appellant; by W. N. Maguire to a list of persons selected by Stewart Edward White and to four or five of her friends interested in Stewart Edward White's work; by Margaret Oettinger to persons designated by Stewart Edward White, to two or three of her own friends, and in compliance with requests from Stewart Edward White, Katherine Benner, and appellee; and by Ivy Duce to persons known to Stewart Edward White. In other words, the distribution was made to a list of persons directly selected by Stewart Edward White or by others acting with

his authority. Such selected persons were friends, acquaintances, or persons particularly interested in the subject matter. The evidence further shows that the manuscript was not made available to members of the general public by being placed in public libraries, commercial lending libraries, or in retail book stores.

It is suggested that the following language from *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Company*, *supra*, at 875, is particularly applicable to this case:

“... if a book be offered gratuitously to the general public, it will constitute publication. *This may be done by presenting it to public libraries, and this is so because the author or publisher, by that act, puts it in such a place that all the public may see it if they choose.* The reason why exposing for sale or offering gratuitously to the general public constitutes publication is stated in the last part of the rule as follows: ‘So that any person may have an opportunity of enjoying that for which copyright is intended to be secured.’ . . . Several cases have arisen where the courts have held that the private circulation of pictures, manuscripts, or printed books did not constitute a publication, such as *Prince Albert v. Strange*, *supra*; also *Bartlette v. Crittenden*, 4 McLean, 300 Fed. Case No. 1,082 where the plaintiff, a teacher of book-keeping, for the convenience of his pupils, wrote his system of instructions on separate cards, which they were permitted to keep for their convenience. So a gratuitous circulation of copies of a work among friends and acquaintances has been held not to amount to a publication. *Dr. Paley's Case*, cited in 2 Ves. & B. 23, was one where a bookseller was restrained from publishing manuscripts left by Dr. Paley for

the use of his own parishioners only. Coppinger, in his work on Copyright, at page 117, after considering the last case cited and others, reached the following conclusion: 'The distinction is in the limit of the circulation. *If limited to friends and acquaintances, it would not be a publication; but, if general, and not so limited, it would be.*' (Emphasis added.)

C. Errors Specified Are Without Foundation.

1. In answer to specification one: The evidence shows conclusively that the "Gaelic" manuscript was distributed to a selected group, and at no time was it ever placed where any member of the general public could, if he chose, have access thereto.

2. In answer to specification two: The evidence shows that from 82 to 105 copies were distributed. This does not include copies distributed by Margaret Oettinger, the number of which can be fixed only by inference. These figures do not take into consideration the number of copies produced. It would not appear that the trial judge was far wrong in his estimate. However, the point is unimportant since the number of copies distributed has no bearing on the question of whether there was a general publication or a limited publication.

3. In answer to specification three: The evidence shows that Stewart Edward White gave Margaret Oettinger permission to "pass around copies among such of their friends who want copies," and to charge "such people the exact cost." [Defendant's Exhibit "A."] It is so clear from the authorities cited above, that distribution to "friends" is a limited Publication that the point need not be labored. There is no showing that Mrs. Oettinger acted outside of the scope of her permission. It is also

clear that she was authorized to collect from individual distributees "the exact cost" of mimeographing copies. The evidence shows that she complied with this instruction to the best of her ability [Tr. pp. 119, 131-132]. The contributions by distributees of their proportionate share of the costs have none of the earmarks of the customary vendor-vendee relationship in a commercial transaction.

4. In answer to specification four: The testimony of appellee [Tr. pp. 159-160], Ivy Duce [Tr. pp. 185-187] and Don Stevens [Tr. pp. 222-223], shows definite limitations on the use to be made of the "Gaelic" manuscript. The testimony of none of these persons has been impeached.

5. In answer to specification five: The testimony of Ivy Duce [Tr. pp. 197-198] and of Don Stevens [Tr. pp. 215-216] shows that the persons who received copies reproduced by Mrs. Duce shared the actual expenses incurred in mimeographing the manuscript. It was a co-operative enterprise only, and not a vendor-vendee transaction. There is no finding that Ivy Oneita Duce was not given permission to reproduce the "Gaelic" manuscript.

6. In answer to specification six: This specification is so loose and general as to be entirely devoid of any merit, and therefore falls of its own weight.

D. The Law.

1. The right to the product of one's intelligence, imagination, or skill, whether in the realm of literature, music, or art, was recognized by courts long before recognition was given to these rights by statute.

18 *Corpus Juris Secundum*, pp. 139-141, Copyright and Literary Property, Sections 4-10.

2. An author has, at common law, a right of property in his intellectual production, sometimes called the right of first publication, which still exists independent of copyright statute.

Werkmeister v. American Lithographic Company,
234 Fed. 321 at 324;

Bobbs-Merrill Company v. Straus, 147 Fed. 15 at
18 and 19;

Civil Code of California, Sections 655, 980(a),
982(a) and 983(a).

3. The copyright statute gives to an author the exclusive right to multiply copies of his work during the term fixed by the statute. When he invokes the statute he loses his rights at common law.

*Jewelers' Mercantile Agency v. Jewelers' Weekly
Publishing Company*, 49 N. E. 872 at 873;

Bobbs-Merrill Company v. Straus, *supra* at 19.

4. The common law right of property which an author has in his work is lost by general publication but not by a limited or qualified publication.

*Jewelers' Mercantile Agency v. Jewelers' Weekly
Publishing Company*, *supra* at 875;

Werkmeister v. American Lithographic Company,
supra at 324.

5. General publication of the work of an author occurs when there is such a disclosure, communication, circulation, exhibition, or distribution tendered or given to one

or more members of the general public as implies an abandonment of the right of first publication or a dedication of the work to the public.

Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Company, *supra* at 875;

Werkmeister v. American Lithographic Company, *supra* at 324.

6. A limited publication is one made under restrictions limiting the use or enjoyment of the subject matter to definitely selected individuals or to a limited, ascertained class, or to some particular occasion or definite purpose, and no rights inconsistent with or adverse to such restrictions are surrendered.

Bartlett v. Crittenden, 2 Federal cases No. 1082;

Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Company, *supra* at 875;

Werkmeister v. American Lithographic Company, *supra* at 324;

Keene v. Wheatley, 14 Federal cases, 180 at 199, No. 7644;

Berry v. Hoffman, 189 Atl. 516 at 519.

7. Merely exhibiting a manuscript to others or making a gift of a copy thereof, or circulating copies among friends for their own personal enjoyment is not such publication as will terminate common law rights therein.

Werkmeister v. American Lithographic Company, *supra* at 325;

Bobbs-Merrill Company v. Straus, *supra* at 18.

8. The intention with which the disclosure or communication is made is a material circumstance, yet intention will be determined not by what the author says but by what he does.

Kurfiss v. Cowherd, 121 S. W. 2d 282 at 287.

In conclusion, the issues involved in this case are clear-cut and simple. A perusal of the testimony offered on behalf of appellant shows that he has failed to meet the burden of proving that there was a general publication of the "Gaelic" manuscript. In fact, the effect of all of the testimony, both on behalf of appellant and appellee, sustains the proposition that there was a limited publication thereof as defined by many well-considered authorities.

The decision should be sustained.

Respectfully submitted,

LESLIE F. KIMMELL,

Attorney for Appellee.

No. 12862.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. T. DUTTON AND COMPANY,
INC., a corporation,

Appellees.

APPELLANT'S REBUTTAL BRIEF.

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APPELLANT'S REBUTTAL BRIEF.

I.

Appellee's Reply Brief Is Based Upon an Assumption of Fact Not Sustained by the Evidence.

Appellee, Susan C. Kimmell, repeatedly through her brief, assumes that Stewart Edward White had the "Gaelic" manuscript reproduced and passed it around to a few of his friends. Were this the case appellee's argument would have more validity. The wording of appellee's brief is somewhat evasive, she says that Stewart Edward White, Margaret Oettinger, Ivy Duce, appellant and others circulated and distributed the manuscript to friends and acquaintances. Nowhere is it specified to *whose* friends and acquaintances distribution was made. It would be difficult to find an individual so unattractive, so reclusive or so inconspicuous that he would be no one's friend or acquaintance. Many friends of Stewart Edward White were

supplied with copies of "Gaelic", so were friends of Mrs. Oettinger, appellee, appellant, Mrs. Duce, and so were friends of their friends, and very significantly, so were strangers who communicated with Stewart Edward White or Mrs. Oettinger and were either given a copy or supplied one at \$2.00 or \$1.50 per copy. We quote appellee's own testimony on the subject:

"Q. (By Mr. Mullen): You don't know the persons to whom the copies of 'Gaelic' were sent in that period, who read it or exchanged it in that seven-year period? A. I know some of them, and Mr. White told me about some of those people that received them.

Q. You don't purport, however, to represent, by any sense of the word, you knew all the people to whom it was handed, or what their background or connection was, if any, with Stewart Edward White? A. No.

Q. You have no personal knowledge, do you, Mrs. Kimmell, as to what the cost of the making of copies was by Mrs. Oettinger? A. No.

Q. You don't know that they cost her \$2.00 flat and even, do you? A. I don't know that they cost her \$2.00. I know about Mrs. Duce, who made the same copies.

Q. I am referring to Mrs. Oettinger. A. No, I don't. I had no correspondence with her about it.

Q. When you stated that these friends of yours, to whom you gave Mrs. Oettinger's name, that sent Mrs. Oettinger \$2.00 for the copies, that was the cost, that is your judgment as to what— A. That is my judgment, based on the fact that Stewart Edward White, in his letter submitted as evidence, said she was to charge only the cost of reproduction. That would be a fair assumption then.

Q. You are not personally familiar with whether they cost her a dollar or a dollar and a half, or what?

A. No.

Q. You do know that copies were sold at \$2.00?

A. \$2.00 was paid for them."

Patently the manuscript was sold, given and circulated far beyond the circle of Stewart Edward White's friends and acquaintances for a period of many years.

II.

Application of the Law to the Facts of This Case.

1. Appellee's Conclusions as to the Law Are Entirely Too Broad.

Appellee draws from the cases cited much broader conclusions than they justify.

Appellee cites *Werkmeister v. American Lithographic Company*, 207 U. S. 284 at 299, for the following proposition as appellee states it on page 10 of her brief:

"To constitute general publication the work must be made available in some manner and in some place to the general public without discrimination as to persons, so that any member thereof who chooses may have access thereto. There must be no restrictions of any kind imposed by the author. . . ."

The Supreme Court, in the *Werkmeister* case, sums up the law as follows:

"The result of an examination of the authorities seems to show that the following propositions are established: a general publication consists in such a disclosure, communication, circulation, exhibition or

distribution of the subject of copyright, tendered or given, to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public. Prior to such publication, a person entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals or a limited, ascertained class or he may expressly or by implication confine the enjoyment of such subject matter to some occasion or definite purpose. . . .”

Appellee further says on page 10, the following:

“If any sort of express or implied restrictions are imposed, the result is a limited publication, and the author does not lose his property in the subject of such limited publication.”

The foregoing does not conform to the law. Any sort of restriction will not prevent a publication. The restriction must be a limitation to a definite class or to selected individuals.

Again in the *Werkmeister* case the court says:

“ . . . The nature of the subject matter, the character of the communication, circulation or exhibition and the nature of the rights secured are chiefly determinative of the question of publication.”

2. **The Intent With Which a Publication Is Made Is a Material Circumstance to Be Considered but Is Not Controlling.**

Berry v. Hoffman, 189 Atl. 516 (Pa.);

Waring v. WDAS, 194 Atl. 631.

To these matters the fundamental legal principle is applied, that the author's acts are measured by what he intended to do, not by what he intended by what he did.

Kurfiss v. Cowherd, 121 S. W. 2d 282;

18 C. J. S., pp. 151-152, par. 13-2.

Actually, the acts of the author in this case show a clear intent to donate the work to a segment of the general public. For a period of about twenty-five (25) years he circulated the document among members of the general public sufficiently interested to read it or ask for it; he had the document made up in mimeograph book form, and sent copies to many people with instructions to circulate it among their friends and acquaintances; he maintained his own circulating library of copies which he loaned freely to anyone desiring to read it: Mrs. Oettinger, a stranger to the author, was given a copy by someone who had received it from Stewart Edward White, she requested of Stewart Edward White the right to reproduce the manuscript and sell it at cost to a group of her friends and friends of her friends. Stewart Edward White, by his own statement, consented to an indefinite group of people in Palo Alto reproducing the document and selling it at cost among their friends; he himself referred people to Mrs. Oettinger for copies, at \$2.00 each, indiscriminately,

both friends and strangers. Patently it appears that Stewart Edward White considered the work a kind of a collection of basic philosophical ideas communicated to him by "Gaelic" and felt that the reading of it would be beneficial to people at large and went to considerable expense and trouble to make it available. Nowhere does it appear that Stewart Edward White had any other motive than publication in circulating the manuscript. Even appellee concedes that the only limitation on the circulation was to those "particularly interested in the subject matter." No other criterion for selection of readers is even suggested.

3. The Cases Holding Publications to Have Been Limited or Private Are Those Where the Author Uses His Own Work for His Own Private or Professional Purposes.

(a) A preacher's sermon notes published to his own parishioners.

Dr. Pelley's case, 2 Ves. & B. 23.

(b) A teacher's lecture notes and instruction to his pupils.

Bartlett v. Crittenden, 4 McLean 300;

Waring v. WDAS, 194 Atl. 631.

(c) A doctor's instructions to his patients.

Schellberg v. Empringham, 36 F. 2d 991 (D. C. N. Y.).

(d) A private exhibition of a picture or statue with reservations against copying which are enforced.

American Tobacco Co. v. Werkmeister, 207 U. S. 284, 52 L. Ed. 208;

Carns v. Keefe, 242 Fed. 745.

(e) Performance by the author of a musical composition does not constitute publication.

Waring v. WDAS, 194 Atl. 631 (Pa.).

However, printing and distributing a musical composition or dramatic work does constitute publication.

Savage v. Hoffman, 159 Fed. 584;

Wagner v. Conreid, 125 Fed. 798;

Daly v. Walrath, 57 N. Y. Supp. 1125.

4. The Effect of the Author's Acts in This Case Is to Dedicate the Manuscript to the General Public and Release It for Use by Anyone.

Moore v. Ford Motor Co., 43 F. 2d 685;

Hurwitz v. Meyer, 10 F. 2d 370;

Van Veen v. Franklin Knitting Mills, 260 N. Y. Supp. 163;

Gilmore v. Sammons, 269 S. W. 861 (Tex.);

Affiliated Enterprises v. Gruber, 86 F. 2d 958;

Bobbs-Merrill Co. v. Straws, 210 U. S. 339, 52 L. Ed. 1086.

This is true whether or not the author intended to release his exclusive rights.

Kurfiss v. Cowherd, 1215 S. W. 2d 282 (Mo.);

Van Veen v. Franklin Knitting Mills, 260 N. Y. Supp. 163;

Waring v. WDAS, 194 Atl. 631 (Pa.).

III.

The Court May Not, as Was Done Here, Disregard Credible, Unimpeached Testimony of Witnesses Who Know the Facts and Arbitrarily Make a Decision Contrary Thereto.

Twentieth Century-Fox v. Deickhaus, 153 F. 2d 893.

IV.

Conclusion.

The court here rendered a decision which disregards the testimony of several credible witnesses familiar with the acts and whose testimony was unimpeached. As a matter of fact, the decision runs contrary to the manifest intent and declarations of the author himself. The court seizes upon testimony of three persons who were unfamiliar with the facts and whose testimony does not purport to cover or relate to the contended publication of the manuscript in question by the author and Mrs. Oettinger, with his consent. The findings drawn in the light of the evidence are equivocal and insufficient and reflect the state of the record. The cause should therefore be reversed with directions to make findings in favor of appellant and to enter judgment thereon.

Dated: June 28, 1951.

Respectfully submitted,

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ROBERT W. McINTYRE,

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No. 12862.

IN THE

United States Court of Appeals

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INC., a corporation,

Appellees.

APPELLEE'S PETITION FOR REHEARING.

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FILED

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No. 12862.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY,
INC., a corporation,

Appellees.

APPELLEE'S PETITION FOR REHEARING.

*To the United States Court of Appeals for the Ninth
Circuit:*

Judgment for the appellee, Susan C. Kimmell, has been reversed upon the sole ground that the trial court's findings that the reproduction and distribution of the Gaelic manuscript amounted to a limited and restricted publication only, that there was no general publication of it, and that the manuscript was not in the public domain, were not justified by the evidence. The opinion filed January 7, 1952, contains the following statement:

"It appears to us that the Court disregarded in large part vital and uncontradicted testimony, notably that of White's secretary (W. N. Maguire), and of Mrs. Oettinger."

It is now clear that counsel for the appellee gave inadequate attention in his brief to what has turned out to be the crucial point of the case. In justice to the appellee, and before she is deprived of her rights as owner of the Gaelic manuscript, this Court is petitioned to grant a rehearing so that consideration may be given to the following points:

- I. Rule 52(a), Rules of Civil Procedure, 28 U. S. C. A., is applicable to this case.
- II. It was the province of the trial judge to pass upon the credibility of the witness Maguire.
- III. The trial Judge had the responsibility of evaluating the testimony of the witness Oettinger.
- IV. There was substantial evidence before the trial Court to support the findings of fact.
- V. The findings are not clearly erroneous within the meaning of Rule 52(a).

I.

Rule 52(a), Rules of Civil Procedure, 28 U S. C. A.,
Is Applicable to This Case.

Rule 52(a) reads in part as follows:

“In all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses”

In *Sawyer v. Crowell Pub. Co.* (2 Cir., 1944), 142 F. 2d 497, a suit for copyright infringement, the Court on page 499 said:

“On the record as it stands we cannot say that the Court’s findings of fact above quoted was clearly erroneous. The rule that only such a finding may be set aside is as applicable to an action for copyright infringement as any other action.” Citing *Darrell v. Joe Morris Music Co.* (2 Cir.), 113 F. 2d 80.

Other cases involving literary property in which the rule is invoked are as follows:

Egner v. E. C. Schirmer Music Co. (1 Cir., 1943),
139 F. 2d 398;

Esquire Inc. v. Varga Enterprises (7 Cir., 1950),
185 F. 2d 14.

II.

It Was the Province of the Trial Judge to Pass Upon the Credibility of the Witness Maguire.

The testimony of the witness Maguire was given in open Court where the trial Judge had an opportunity to observe her demeanor. If the trial Judge disregarded those portions of her testimony bearing on the question of publication, then the conclusion is inescapable that he doubted her credibility. Since she testified from memory as to the alleged contents of the letter of transmittal mentioned in the opinion filed January 7, 1952, which letter was written in 1933, some 17 years prior to the trial,¹ he was obliged to question the soundness of her memory. In *Egner v. E. C. Schirmer Music Co.*,

¹The approximate date of the letter written 17 years previously is arrived at by referring to portions of the testimony of the witness Maguire and of the appellant. The pertinent portions of the testimony of Maguire are as follows:

“Q. Did you have these copies covered or bound in any fashion? A. I had them bound in the local newspaper shop. I had no press facilities.

Q. I show you at this time, Mrs. Maguire, a mimeographed manuscript which has a *light blue cover on the front and back*, and a dark blue binding, and I ask you if you recognize what this object which I now hand you purports to be? A. Yes, this is one of the first issues or first printings that we made of ‘The Gaelic Manuscript.’” [Tr. p. 81.] (Emphasis added.)

* * * * *

“Q. Do you have a copy at this time of the letter or letters written to these 18, or thereabouts, persons, under the circumstances you have just described? A. No, I do not.

Q. Do you know whether or not at this time any copy of that original letter exists? A. I am sure it does not.” [Tr. p. 84.]

Pertinent portions of the testimony of appellant are as follows:

“Q. Now, approximately when did Stewart Edward White produce the first copy of ‘The Gaelic’—or a copy of the manu-

supra, where a witness Mayer testified from memory as to an alleged assignment made some 20 years previously of the author's rights in a song, the Court said:

"The plaintiffs attack the findings of fact by the trial Court as being contrary to the testimony of Mayer, but it is the function of the finder of fact, in this case the trial Judge, to evaluate the testimony. This evaluation involves not only a determination as to the honesty and credibility of the witness, but, in the case of Mayer, *as to the soundness of memory of transactions 20 years after the date of their occurrence*. We cannot say that the findings of fact by the trial Court were clearly erroneous. Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A." (Emphasis added.)

script as a manuscript in its present form? A. *In the fall of 1933.*" [Tr. p. 61.] (Emphasis added.)

* * * * *

"Q. At the time that Stewart Edward White, or about the time that he compiled 'The Gaelic Manuscript', I think you said about *the fall of 1933*, did you obtain a copy of the compiled work? A. Yes, I did.

Q. In what form did you receive it? A. He sent it to me with a letter, and *it was a book, a blue book, paper-bound; not a regular published book, but it was a mimeographed—mimeographed sheets that were bound together in a blue paper binder.*

Q. Did you receive any communication of any kind from Stewart Edward White concerning this manuscript at or about the time you got the copy? A. Yes, I did.

Q. What was the form of that communication? A. The letter.

Q. Do you now have the letter? A. No, I don't.

Q. Do you know whether or not such letter is now in existence? A. I am pretty sure not, because I made no practice of keeping those letters.

Q. Do you have a recollection as to the substance and contents of that letter? A. Pretty fairly well." [Tr. pp. 63-64.] (Emphasis added.)

Particular attention is called to the strong opinion in *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.* (2 Cir., 1949), 175 F. 2d 77, 80, before L. Hand, Chief Judge, and A. N. Hand and Frank, Circuit Judges. The action was for an infringement of a copyright. The testimony of a witness was uncontradicted and unimpeached by anything appearing in the record, and was not inherently improbable. It was contended that the trial Judge was obligated to accept such testimony as true, and that his refusal so to do was "clearly erroneous." In the opinion by Frank, J., the following language appears:

"The demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial Court by his manner, his intonations, his grimaces, his gestures and the like—all matters which 'cold print does not preserve' and which constitutes 'lost evidence' so far as the Upper Court is concerned. For such a Court, it has been said, even if it were called a 'rehearing Court,' it is not a 'reseeing Court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript' correct in every detail fails to reproduce tones of voice and hesitation of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried. It resembles a pressed

flower. The witness's demeanor, not apparent in the record, may alone have impeached him. The alleged 'rule,' if taken literally, would return us to the practice of trial by deposition, which common law procedure rejected and which, in recent years, has been rejected in Federal noncommon law trials as well.

"Without doubt, the result of our procedure is to vest the trial judge with immense power not subject to correction even if misused. His estimate of an orally testifying witness's credibility may stem from the trial judge's application of an absurd rule-of-thumb, such as that when a witness wipes his hands during his testimony, unquestionably he is lying; but, unless the Judge reveals of record that he used such an irrational test of credibility, an Upper Court can do nothing to correct his error. We thus have what Tourtoulon called the 'sovereignty' of the trial Judge. Demeanor, to be sure, is no infallible guide to reliability of testimony; yet as matters now stand, it is one of the best guides available."

In *Wittmayer v. United States* (9 Cir., 1941), 118 F. 2d 808, 811, before Garracht and Healy, Circuit Judges, and St. Sure, District Judge, the following statement of the rule appears:

"As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U. S. 350, 353, 61 L. Ed. 356 (citing *Davis v. Schwartz*, 155 U. S. 631, 636, 39 L. Ed. 289) the case is preeminently one for the application of the practical rule that so far as the findings of the trial Judge who saw the witnesses 'depends upon

conflicting testimony or upon the credibility of the witnesses, or so far as there is any testimony consistent with the findings, it must be treated as unassailable.’ ”

Also, in *Grace Bros. Inc. v. Commissioner of Internal Revenue* (9 Cir., 1949), 173 F. 2d 170, before Mathews and Healy, Circuit Judges, and Yankwich, District Judge, the following pertinent statement appears:

“In the application of this rule * * * reviewing Courts have emphasized the importance of the conclusions of the trial Judge which derive from his opportunity to pass upon the credibility of witnesses. And they have declined to resolve the conflict in the testimony of witnesses their own way.”

From the foregoing authorities it is difficult to see how this Court can question the determination of the trial Judge to disregard the testimony of the orally-testifying witness Maguire.

Possibly the trial Judge found it necessary to question the soundness of the memory of appellant, also.

III.

**The Trial Judge Had the Responsibility of Evaluating
the Testimony of the Witness Oettinger.**

The value of the testimony of the witness Oettinger must be determined in the light of its manifest vagueness and confusion. This is illustrated by the following excerpt from her testimony:

“Q. But prior to his letter of May 18, 1945, as far as you can recall, there was no restriction about what you could do? A. No.

Q. With the manuscript? A. In the discussion that we had about it, I believe that I made some kind of remarks about, ‘Of course, we will just mimeograph it and distribute it at—or to friends,’ or something like that. ‘Give these people that want copies.’ It wasn’t—the whole thing was so informal that it is hard to remember even.

Q. But there was no definite limitation as to whom you could sell or give copies? A. No, he never did.”
[Tr. p. 117.]

In one breath she says that the manuscript is to be distributed only to friends, and in the next she says that there was no limitation as to whom copies could be sold or given. And along with the contradiction she admits that she does not remember what the arrangement was with Stewart Edward White which was made some ten years prior to the time of the trial. Yet the letter written in 1940 by Stewart Edward White to the appellee [Def’t. Ex. “A”], which is set forth at length

in the opinion filed January 7, 1952, shows that there was an agreement between the author and the witness that mimeographed copies of the manuscript would be passed around among a limited, ascertained group or class, to-wit, "*such of their friends who want copies.*" It is strongly urged that this letter and this testimony must be considered together and that the letter, being a written record, is the stronger evidence. (Emphasis added.)

It is submitted that the rule laid down in *Egner v. E. C. Schirmer Music Co., supra*, particularly applies to this witness; and that therefore the evaluation given to the testimony of this witness by the trial Court is not clearly erroneous.

Referring to the letter written by Stewart Edward White to Mrs. Oettinger in 1945, a part of which is set forth at length in the opinion filed January 7, 1952, the substance thereof is that White had no objection to the distribution of copies "provided, of course, it is not in published form." In the opinion the words "in published form" are held to mean "in book form." However, the trial Court, in his opinion, states that this language means that White reserved "publication" rights, and that Mrs. Oettinger was not granted permission to distribute copies of the Gaelic manuscript to the general public. In *Order of Railway Conductors of America v. Swan* (7 Cir., 1945), 152 F. 2d 325, 327, it is said:

"However, the definitions of words, either common or technical, involve questions of fact and we are bound by the Court's finding as to the definitions if they are supported by substantial evidence."

In view of the foregoing authority, the meaning given to "in published form" by the trial Court should not be changed by this Court.

At this point it can be pointed out that the trier of facts was faced with problems in reconciling the testimony of Maguire and Oettinger. To illustrate, attention is called to the following excerpts from the testimony of Maguire and Oettinger and to the letter from Stewart Edward White to appellee written in 1940. First from Maguire:

"Q. In your capacity as Mr. White's secretary did you handle any other correspondence between Mrs. Oettinger and Stewart Edward White? A. Yes, a number of letters before this one was written, when she was a resident of Palo Alto, California.

Q. Do you at this time, Mrs. Maguire, have copies of the correspondence that was received and written by Stewart Edward White with Mrs. Oettinger? A. No, sir, I do not.

Q. Do you know whether or not at this time such copies are in existence? A. I think probably not.

Q. Can you recall generally the substance or purpose of the correspondence? A. Yes. I remember that the first letter I was from her and that the first letter I was asked to transcribe in reply to it, was one she wrote Mr. White saying she had just been allowed to read a copy of 'Gaelic' by a Mrs. Katherine Benner in San Mateo, and it had fascinated her so much and interested her so intensely she would like to have other copies and was that possible.

Mr. White replied in a very short letter he had no more copies, he was sorry, but she might, with Mrs. Benner, when Mrs. Benner was through with it, she might make whatever use she could of this one copy. As I recollect, she replied almost at once that since she was so deeply interested she would like more than one copy and would it be possible, would he allow her to make some mimeographed copies for herself.

Q. What was Stewart Edward White's reply, if any, to that request? A. He replied that she was at liberty to do so, he would be glad to have her do it if she wished." [Tr. pp. 92-93.]

Second, from Oettinger:

"A. Yes, she read the copy that I had borrowed of this manuscript and we discussed it, and we both thought that there was some very valuable material in the manuscript and that we would like to have copies. *I called up Mr. White on the telephone* and asked him if we could obtain further copies, and he said that there were no more copies, *and either at that time or in a later conversation on the telephone* I asked him if he would have any objection to any copies being made and *he then invited us to come over to his house and discuss the matter.*" [Tr. p. 121.] (Emphasis added.)

We are compelled to recognize the fact that these two witnesses contradict each other as to whether the arrangements between White and Oettinger were made by correspondence or by telephone and personal interview. It may well be that the trial Judge was impressed by this point in evaluating the testimony of Maguire and Oettinger.

IV.

There Was Substantial Evidence Before the Trial Court to Support the Findings of Fact.

The opinion of the Court holds that the testimony of the witnesses Duce and Stevens is of limited value because it relates to a time not earlier than 1943, and that the testimony of these two, as well as that of the appellee, has no bearing on publication by Stewart Edward White or Mrs. Oettinger. According to the testimony of these three, White gave them very definite instructions, cautioning them to restrict the circulation of the manuscript to carefully selected individuals. As a matter of logic, there is no reason to believe that White would have been any less careful prior to 1943 than he was after that time. It is reasonable to infer that he followed the same careful policy from the beginning. In fact, the appellee testifies as follows:

“A. I was there alone. I couldn’t give you the exact date. It was in the spring of 1941, if I am not mistaken, when I next visited him.

Q. What did Mr. White say? Did Stewart White say anything with reference to limitations?

A. He said that Mrs. Oettinger was making these copies. She had been introduced to him by a mutual friend, Katherine Benner, of San Mateo. *He felt her to be a woman of discretion and he could trust her not to broadcast the copies generally, but to use care as to the people to whom she gave them.*” [Tr. pp. 158-159.] (Emphasis added.)

In *Cashman v. Mason* (8 Cir., 1948), 166 F. 2d 693, it is held that, in considering whether the District Courts' findings are clearly erroneous, appellees must be given benefit of all favorable inferences which reasonably may be drawn from the evidence.

In *Paramount Pest Control Service v. Brewer* (9 Cir., 1949), 177 F. 2d 564, before Denman, Chief Judge and Bone, Circuit Judge, and McCormick, District Judge, in the opinion by McCormick, J., the rule is stated as follows:

“We are not at liberty to substitute our judgment for that of the trial Court, and on appeal that view of the evidence must be taken which is most favorable to the prevailing party; and if, when so viewed, the findings are supported by substantial competent evidence, they should be sustained.”

V.

**The Findings Are Not Clearly Erroneous Within the
Meaning of Rule 52(a).**

The weight of the testimony adduced by the appellee establishes that the findings are not “clearly erroneous.” The facts and holding in *Baron v. Leo Feist, Inc.* (2 Cir., 1949), 173 F. 2d 288, support this contention. In that case there was a finding that a song had been written by one Belasco some 35 years previously. The Court said that there were some doubts, but it was not an impossible story, and referred to the fact that there was supporting testimony. It was held as follows:

“We are by no means convinced that the finding that Belasco created the song in 1906 was ‘clearly erroneous.’ ”

Attention is also called to the following:

Egner v. E. C. Schirmer Music Co., supra;

Sawyer v. Crowell Publishing Co., supra;

Esquire v. Varga Enterprises, supra.

A rule pertinent to the instant case is stated in *United States v. Yellow Cab Co.*, 338 U. S. 338, 94 L. Ed. 150, which is expressed in headnote 4 as follows:

“While it is the duty of the Supreme Court to correct clear error, even in findings of fact, a choice by the tryer of facts between two permissible views of the weight of evidence is not ‘clearly erroneous’ within the meaning of Rule 52 of the Federal Rules of Civil Procedure.”

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions.

The opinion filed January 7, 1952, states that "White does not appear in the record as a teacher or a propagandist endeavoring to persuade. He is not pictured as a man with a message." While it is conceded that the record does not show that White was a leader of a cult or was given to public exhortations, yet he did have a metaphysical philosophy of living which he considered to be important, and which he wished to share only with those who were sympathetic toward such ideas. This is shown by the testimony of appellee as follows:

"Q. Can you list the number of books on metaphysical subjects which Stewart Edward White has written? A. There were 10 all together: 'Credo,' 'Why Be a Mud Turtle,' 'The Betty Book,' 'The Unobstructed Universe,' 'Across the Unknown,' 'The Road I Know,' 'Anchors to Windward,' 'The Stars Are Still There,' 'With Folded Wings,' 'The Job of Living.'" [Tr. p. 152.]

It is respectfully suggested that a man who has written 10 books on a particular subject, does have a message with respect to that subject.

In view of the foregoing, it is urged that this case be viewed in the light of *Shellberg v. Empringham* (1929), 36 F. 2d 991. In this case the plaintiff made available to his patients a large number of reprints of an article which he had written for a medical journal. Copies were kept on a table in his reception room where they might be examined and carried away by patients and visitors. Several thousand persons had access to these reprints. It was held that the primary purpose of the distribution

was to give information to persons interested in the subject discussed in the article, and to relieve the plaintiff Shellberg of the necessity of explaining his system of treatment to those who might wish to learn about it, and that the plaintiff should not be held to have dedicated his article to the public. In the case before the Court the purpose of the distribution of the Gaelic manuscript in the manner shown was for the purpose of giving information to persons interested in the subject-matter thereof and the author should not be held to have dedicated the material to the general public, without discrimination as to persons.

The petition for rehearing should be granted.

Respectfully submitted,

LESLIE F. KIMMELL,
Attorney for Appellee.

Certificate of Counsel.

It is my judgment that this Petition for Rehearing is well founded and not interposed for delay.

LESLIE F. KIMMELL.



No. 12862

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY,
INC., a corporation,

Appellees.

APPELLANT'S REPLY TO PETITION FOR REHEARING.

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INC., a corporation,

Appellees.

**APPELLANT'S REPLY TO PETITION FOR
REHEARING.**

I.

**This Court Has Given Full Consideration to All Mat-
ters Raised by Appellee in Her Petition for
Rehearing.**

A. RULE 52(a).

Appellee's pointed reference to the fundamental and elemental principle enunciated in the above rule seems absurd to appellant. We feel sure that the court was fully cognizant of this basic principle and applied it properly whether or not it was specifically brought to the court's attention by counsel during argument. Counsel for appellant feels that unless there is some peculiar, special or unusual application of the rule presented by this case, which there is not, that it is presumptuous indeed to intimate that the court did not properly apply Rule 52(a).

B. THE TRIAL COURT DID NOT FIND APPELLEE'S WITNESSES INCREDIBLE.

The findings made by the trial court in this matter are so ineffectual that they are of little assistance in determining what the court did or did not believe. However, reference to the court's opinion clearly shows that he did not feel that either Maguire or Oettinger were liars. The trial court, to be sure, placed unwarranted interpretations upon the testimony of these witnesses or in many instances ignored it where it did not fit his wishes in respect to the decision made, but he does not indicate they were liars. These witnesses are respectable, honorable citizens with nothing to gain from the decision of the court, their testimony is absolutely unimpeached and is entirely credible and reasonable on its face. As a matter of fact, the essential facts testified to by these witnesses are plead by appellant in his complaint which commenced this proceeding. These facts are virtually all admitted by appellee's answer, the burden of which is that though the publication alleged was had, it constituted only a limited publication because distribution was made only to "persons particularly interested in the subject matter." Through the briefing in this matter there was little dispute in respect to facts, reference to the briefs shows clearly that the disputes arose over the conclusions to be drawn from admitted facts, the very facts to which these witnesses testified. Further, the controversy swings around the meaning of admitted declarations by the author himself made under admitted cir-

cumstances. It seems to appellant that it is highly ungracious, to say the least, for appellee, under the circumstances, to denounce these witnesses as liars. In respect to appellee's witnesses we say and have said that they were biased, partisan and highly opinionated, and testified to unsupported conclusions, drew unwarranted inferences and, in fact, did considerable arguing from the witness stand, but we have not charged that they deliberately falsified facts nor intimated that they were despicable liars. Such charges should be made, reluctantly and regretfully, only where deliberate falsehood is patent.

We think appellee's petition for a rehearing indicates an interest only in the outcome of the case with a complete disregard for the justice or propriety of such determination.

C. NO NEW ISSUES ARE RAISED BY APPELLEE'S PETITION.

There is nothing mentioned in appellee's petition for rehearing which has not been duly considered heretofore. No suggestion is made other than that the trial court's findings and decision should not have been disturbed. Whether or not the trial court's decision was supported by the evidence was the basic point argued on this appeal and it was the decision of this court that it was not. Appellee's petition seems to be nothing but a generalized complaint to the effect that this court was wrong and the trial court right with nothing presented to support such

a contention that has not been completely and thoroughly briefed and argued and presented to and determined by this court.

It is respectfully urged that the petition should be denied.

Respectfully submitted,

SCHAUER, RYON & McMAHON,

By ROBERT W. McINTYRE,

Attorneys for Appellant.

No. 12867

United States
Court of Appeals
for the Ninth Circuit.

Serial 2689

WESTERN AIR LINES, INC.,

Petitioner,

vs.

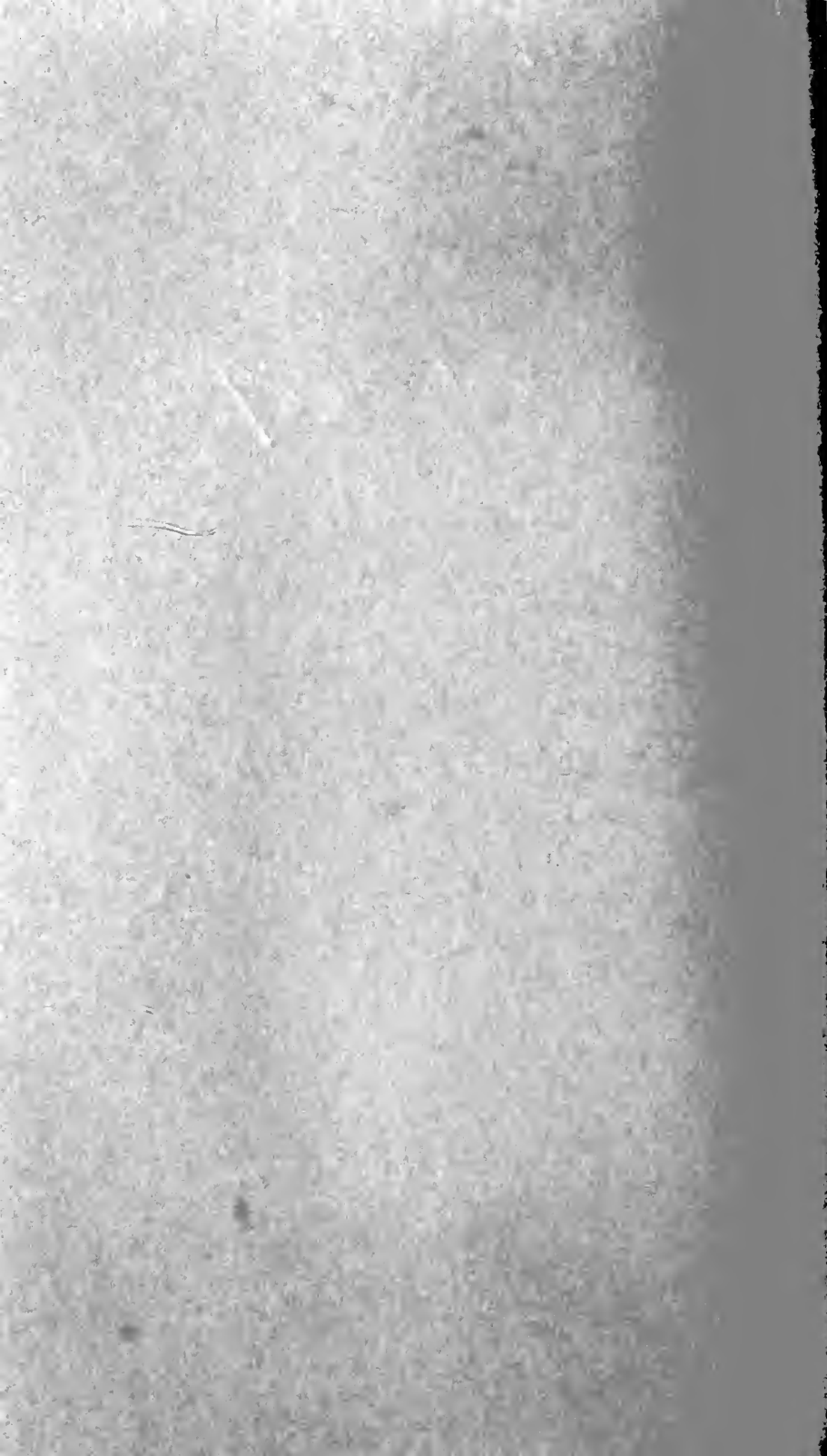
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Respondent.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 462)

Petition For Review of Orders of the
Civil Aeronautics Board.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
JUL 1951
PAUL P. O'BRIEN
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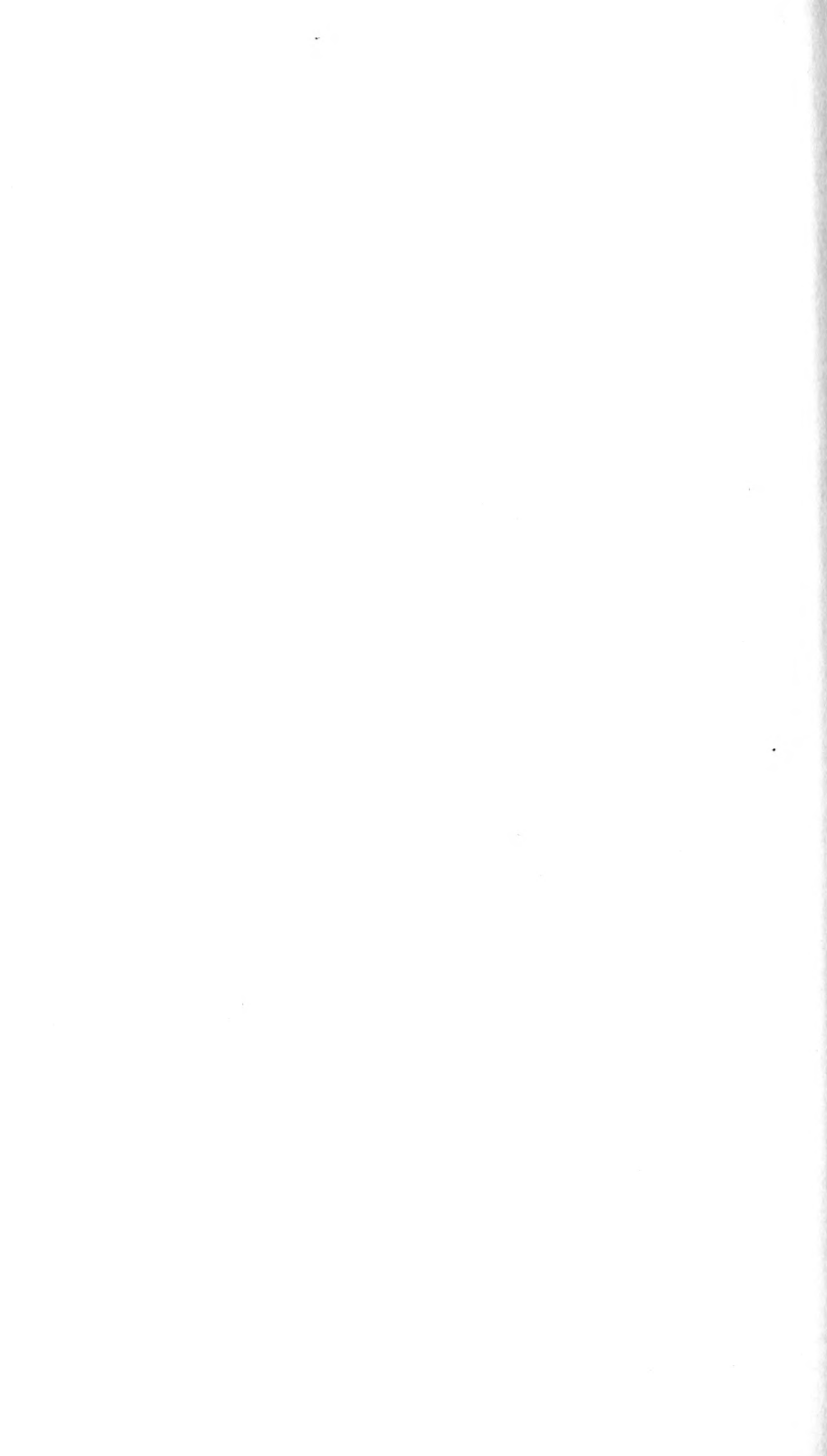
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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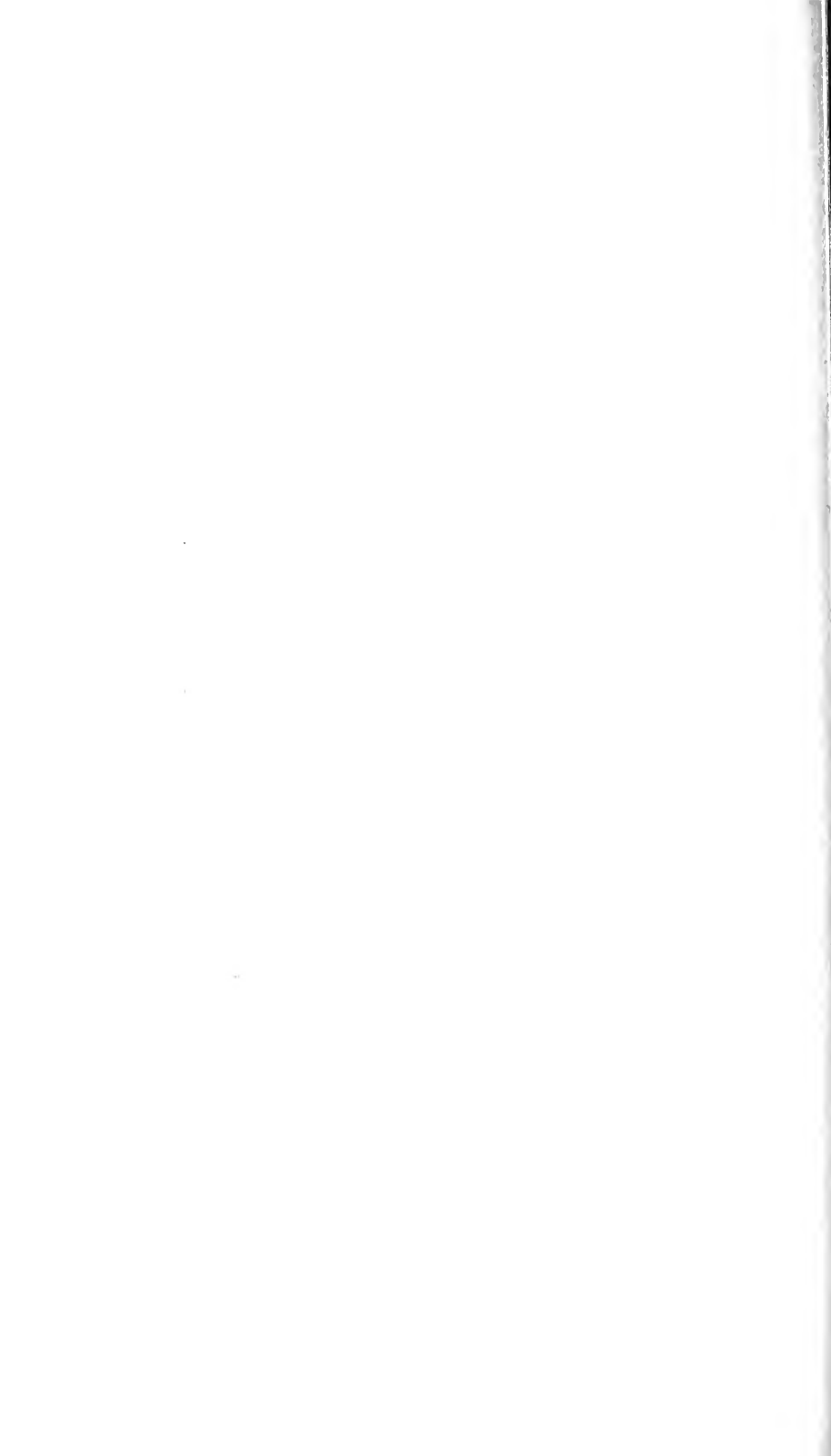
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Before the Civil Aeronautics Board

Docket No. 2839

In the Matter of:

The Application of WESTERN AIR LINES, INC., and UNITED AIR LINES, INC., Under Sections 401, 408 and 412 of the Civil Aeronautics Act of 1938, as Amended, for an Order Approving an Agreement for the Sale of Certain Properties and the Transfer and Amendment of a Certificate of Public Convenience and Necessity.

APPLICATION

Applicants, Western Air Lines, Inc., and United Air Lines, Inc., respectfully represent:

I.

Western Air Lines, Inc., referred to as "Western," is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 135 South Doheny Drive, Beverly Hills, California.

United Air Lines, Inc., referred to as "United," is a corporation organized and existing under the laws of the State of Delaware with its principal office located at 5959 South Cicero Avenue, Chicago, Illinois.

II.

Western is an air carrier holding certificates of public convenience and necessity issued under the

Civil Aeronautics Act of 1938, as amended, for the transportation of persons, property and mail over routes designated as Numbers 13, 19, 52, 63 and 68.

United is an air carrier holding certificates of public convenience and necessity issued under the Civil Aeronautics Act of 1938, as amended, for the transportation of persons, property and mail over routes designated as Numbers 1, 11, 17 and 57. [2*]

III.

Western and United are citizens of the United States as defined by Section I(13) of the Civil Aeronautics Act of 1938, as amended.

IV.

As of March 6, 1947, applicants entered into an agreement under which Western has agreed to sell and transfer and United has agreed to purchase and accept Certificate of Public Convenience and Necessity for Route Number 68 between Los Angeles, California, and Denver, Colorado, and certain other properties, subject to the terms and conditions of the agreement. A copy of the agreement between applicants is marked Exhibit "A" and attached to this application.

V.

The agreement between applicants provides that in the event of approval of the transfer of the certificate for Route Number 68, United shall not have the right to carry passengers, property or mail be-

* Page numbering appearing at top of page of original Reporter's Transcript.

tween Los Angeles, California, and Las Vegas, Nevada, and that appropriate steps shall be taken by applicants to cause the certificate to be amended by including a restriction prohibiting the transportation by United of passengers, property or mail between those points.

VI.

Consummation of the agreement between applicants and the transfer of the Certificate of Public Convenience and Necessity for Route Number 68 from Western to United will be consistent with the public interest, will not result in creating a monopoly or monopolies, will not cause a restraint of competition and will not jeopardize any other air carrier.

VII.

The public interest will be affected adversely unless issuance of the Board's order under this application shall be expedited to the extent possible under the Act and under applicable [3] rules of procedure.

Wherefore, applicants pray:

(1) That a hearing be held on this application following the minimum notice required by law and that all procedural steps prior and subsequent to the hearing not involving the Board's jurisdiction or due process of law be waived;

(2) That the agreement between applicants executed as of March 6, 1947, be approved;

(3) That the transfer from Western to United

of the Certificate of Public Convenience and Necessity for Route Number 68, in accordance with the provisions of the agreement between applicants, be approved;

(4) That as and when transferred from Western to United the Certificate of Public Convenience and Necessity for Route Number 68 be amended by including a restriction prohibiting the transportation by United of passengers, property or mail between Los Angeles, California, and Las Vegas, Nevada;

(5) That applicants, jointly or severally, be authorized to execute and deliver any documents and to accomplish any acts which may be necessary or deemed convenient to consummate the agreement between applicants; and,

(6) That such other relief be accorded as may appear appropriate or advisable.

Dated: March 6, 1947.

Respectfully submitted,

WESTERN AIR LINES, INC.,

By /s/ TERRELL C. DRINKWATER,
President.

UNITED AIR LINES, INC.,

By /s/ W. A. PATTERSON,
President. [4]

Verification

State of California,
County of Los Angeles—ss.

Terrell C. Drinkwater, being first duly sworn,
deposes and says:

That he is President of Western Air Lines, Inc., a corporation, one of the Applicants in the above-entitled matter, and is an executive officer of said corporation; that he has read the foregoing Application and is familiar with the contents of said Application and the exhibits attached thereto; that he intends and desires that in granting or denying the rights and privileges therein applied for the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth, and, to the best of his information and belief, each statement contained in said Application is true, and no such statement is misleading; that, in his opinion, said Application does not omit to state any facts known to him which would be deemed by the Board to be of importance to it in reaching its determinations in connection therewith.

/s/ TERRELL C. DRINKWATER.

Subscribed and sworn to before me this 6th day
of March, 1947.

[Seal] /s/ PATRICIA K. McDONALD,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires May 5, 1950. [5]

Verification

State of California,
County of Los Angeles—ss.

W. A. Patterson, being first duly sworn, deposes and says:

That he is President of United Air Lines, Inc., a corporation, one of the Applicants in the above-entitled matter, and is an executive officer of said corporation; that he has read the foregoing Application and is familiar with the contents of said Application and the exhibits attached thereto; that he intends and desires that in granting or denying the rights and privileges therein applied for the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth, and, to the best of his information and belief, each statement contained in said Application is true, and no such statement is misleading; that, in his opinion, said Application does not omit to state any facts known to him which would be deemed by the Board to be of importance to it in reaching its determinations in connection therewith.

/s/ W. A. PATTERSON.

Subscribed and sworn to before me this 6th day of March, 1947.

[Seal] /s/ PATRICIA K. McDONALD,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 5, 1950. [6]

EXHIBIT A

Agreement

This Agreement, Made and entered into as of this 6th day of March, 1947, by and between Western Air Lines, Inc., a Delaware corporation, with its principal office in Beverly Hills, California, hereinafter referred to as "Western," and United Air Lines, Inc., a Delaware corporation, with its principal office in Chicago, Illinois, hereinafter referred to as "United,"

Witnesseth:

That, Whereas, Western is the holder of a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board, pursuant to the Civil Aeronautics Act of 1938, as amended, authorizing the transportation of persons, property and mail over a route between Los Angeles, California, and Denver, Colorado, via Las Vegas, Nevada, and Grand Junction, Colorado, known and designated as Route No. 68, and is the owner of certain properties used and useful in connection with the operation of that route; and,

Whereas, United is the holder of Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board, pursuant to the Civil Aeronautics Act of 1938, as amended and is desirous of acquiring Route No. 68, together with certain equipment and property used and useful in connection with the operation of that route, and West-

ern is willing to sell and transfer to United such route and property, subject to the terms of this agreement;

Now, Therefore, for and in consideration of the premises and mutual promises of the parties, and other good and valuable considerations, it is hereby agreed as follows:

First: Western agrees to assign, transfer and deliver to United its Certificate of Public Convenience and Necessity for Route No. 68 and certain property used and useful in connection with the operation of that route, an itemized inventory of which property will be prepared by Western and approved by the parties and attached to this agreement as Exhibit "A." United agrees to purchase and accept such Certificate and items of property.

Second: The items of property listed in Exhibit "A" shall be subject to substitution by Western at the time of delivery provided the substituted items shall have the same cost value as the items replaced.

Third: United shall pay Western in cash as consideration for this agreement the sum of Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000.00), which sum shall be paid upon the consummation of this agreement, as hereinafter provided.

Fourth: As soon as reasonably possible after the execution of this agreement, the parties acting together shall file an appropriate application with the

Civil Aeronautics Board pursuant to the applicable section or sections of the Civil Aeronautics Act, seeking an order approving the complete consummation of this agreement. The parties shall place in motion every available effort to cause such application to be heard and concluded as expeditiously as possible. Each party shall bear its own expenses which may be incurred in preparing and prosecuting such application.

Fifth: The application referred to in paragraph Fourth shall include a request that the Civil Aeronautics Board amend the Certificate for Route No. 68 simultaneously with the approval of the transfer of said Certificate to United, by including therein a restriction prohibiting the transportation by United of passengers, property and mail between Los Angeles, California, and Las Vegas, Nevada.

Sixth: Within two (2) days following the execution of this agreement, United will loan Western the sum of One Million and no/100th (\$1,000,000.00) Dollars, in cash, as a loan. Upon the receipt thereof, Western will execute and deliver to United a promissory note due on or before September 1, 1947, secured by a Chattel Mortgage. Both the note and Chattel Mortgage shall be in a form approved by United.

In the event the consummation of this agreement is approved by the Civil Aeronautics Board on or before September 1, 1947, the One Million and no/100th (\$1,000,000.00) Dollars so loaned Western shall be credited to the total consideration to be

paid Western under the provisions of paragraph Third of this agreement.

In the event consummation of this agreement shall be disapproved by the Civil Aeronautics Board prior to September 1, 1947, the One Million and no/100th (\$1,000,000.00) Dollars so loaned shall bear interest at the rate of three per cent (3%) per annum from the date of the Board's order.

Seventh: Should the Civil Aeronautics Board approve such acquisition and consummation, the consideration going from United to Western and the consummation of the transfer and assignment of the Certificate and other property shall take place on the 21st day following the issuance of such order of the Board. Delivery of the items of property listed in Exhibit "A" shall be effected at such place as may be designated by United with the cost of effecting the delivery being borne by United.

Eighth: Each of the parties hereto shall execute any assignments, bills of sale, or other documents, which may be required or deemed required to effectuate and fully consummate the objectives of this agreement.

Ninth: In the event, and only in the event, the Civil Aeronautics Board shall issue its order disapproving the consummation of this agreement, the parties hereto shall be relieved of the obligations taken hereunder. Upon the issuance of such order, neither of the parties hereto shall be obligated under any of the provisions hereof, but Western shall,

nonetheless, be obligated to United on account of the promissory note and Chattel Mortgage, according to the terms thereof.

In Witness Whereof, the parties hereto have hereunto set their hands and official seals the day and year hereinabove first written.

WESTERN AIR LINES, INC.,

By /s/ TERRELL C. DRINKWATER,
President.

/s/ PAUL E. SULLIVAN,
Secretary.

UNITED AIR LINES, INC.,

By /s/ W. A. PATTERSON,
President.

/s/ SAM P. MARTIN,
Secretary.

Filed March 7, 1947. [10]

Before the Civil Aeronautics Board

[Title of Cause.]

PETITION OF AIR LINE PILOTS' ASSOCIATION, INTERNATIONAL, FOR LEAVE TO INTERVENE

Names, Titles and Addresses of Persons to Whom
Communiations Are to Be Sent:

David L. Behncke, President, Air Line

Pilots' Association, 3145 West 63rd Street, Chicago 29, Illinois.

John M. Dickerman, Attorney, Air Line Pilots' Association, 1185 National Press Building, Washington 4, D. C. [64]

MOTION FOR LEAVE TO INTERVENE

Comes Now your petitioner, the Air Line Pilots' Association, International (A. F. of L.), an unincorporated Association, commonly known as a "labor union," and respectfully represents that it has a substantial interest in the above-entitled proceeding, and that it desires to intervene and become a party to said proceeding. This Association consists of and is the duly designated representative of the licensed commercial air line pilots flying on certain domestic and foreign American flag air lines subject to the jurisdiction of this Board.

The Association represents that it has entered into contractual relationships, both oral and written, with the air lines respecting wages, hours and conditions of employment of such pilots pursuant to the provisions of the Railway Labor Act, as amended.

The air line pilots employed by Western Air Lines, Inc., have certain contractual employment rights and privileges which are the subject of an Employment Agreement dated November 16, 1940, and certain other amendments, supplements and letters of agreement presently in effect between Western Air Lines, Inc., and the Air Line Pilots' Association, International, negotiated and con-

cluded under the provisions of the Railway Labor Act, as amended. Likewise, the air line pilots employed by United Air Lines, Inc., have certain contractual employment rights and privileges which are the subject of an Employment Agreement originally entered into on October 8, 1940, and certain other amendments, supplements and letters of agreement presently in effect between United Air Lines, Inc., and the Air Line Pilots' Association, International, negotiated and concluded under the provisions of the Railway Labor Act, as amended. Such employment agreements, amendments and supplements cover not only hours and wages but other employment conditions such as travelling expenses, scheduling, vacations, seniority, leaves of [65] absence, transfers, promotions, grievance proceedings and many other rights and privileges in connection with their employment as air line pilots by Western Air Lines, Inc., and United Air Lines, Inc.

There is pending in the above-entitled case an application by Western Air Lines, Inc., and United Air Lines, Inc., for Civil Aeronautics Board approval of an agreement made and entered into as of March 6, 1947, by and between Western Air Lines, Inc., and United Air Lines, Inc., whereby United agrees to purchase, subject to Board approval, for the sum of three million seven hundred fifty thousand dollars (\$3,750,000) from Western, a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board to Western Air Lines, Inc., authorizing the transportation of

persons, property, and mail between Los Angeles, California, and Denver, Colorado, via Las Vegas, Nevada, and Grand Junction, Colorado, known and designated as Route Number 68 and certain other properties used and useful in connection with the operation of that Route.

The Association further represents that it is a matter of great public interest and convenience that the substantial rights which the pilots of Western Air Lines, Inc., have secured by virtue of the agreement made by and between Western Air Lines, Inc., and the air line pilots in the service of Western Air Lines, Inc., as represented by the Air Line Pilots' Association, International, and identified above, would be seriously affected by the proposed sale of Route Number 68 and the property used in connection therewith and are in need of protection and consideration by the Board in this matter. Further, that similar substantial rights which have accrued to the air line pilots employed by United Air Lines, Inc., by virtue of a similar employment agreement, as identified above, are in need of protection and consideration by the Board as a result of this proposed acquisition by United Air Lines, Inc. [66] The Association further states that it represents such property and financial interests of the pilots that they will not be properly represented except through their duly authorized and designated agency, namely, this Association.

Wherefore, this petitioner, the Air Line Pilots' Association, International, prays that leave be granted to it to intervene and participate in the

hearing in order fully to protect its property and contractual rights that have been established throughout the United States and on Western Air Lines, Inc., and United Air Lines, Inc., and for the protection of its members respecting seniority and other employment rights and to become a party to the above-mentioned proceeding with a right to receive notice of and to appear at hearings; to introduce evidence; to produce, examine and cross-examine witnesses; and to be heard upon brief and oral argument if oral argument is granted.

Respectfully submitted,

AIR LINE PILOTS' ASSOCIATION,
INTERNATIONAL,

By /s/ JOHN M. DICKERMAN,

Attorney for the Air Line Pilots' Association, International.

Dated March 15, 1947. [67]

District of Columbia—ss.

John M. Dickerman, being duly sworn, deposes and says: That he is the Attorney for the Air Line Pilots' Association, International, and has specific authority to submit this petition on behalf of the Association; that he has read and is familiar with the contents of the foregoing petition for leave to intervene; that he intends and desires that in granting or denying said petition the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that

he is familiar with the facts therein set forth; and that, to the best of his information and belief, every statement contained in the said petition is true and that no such statement is misleading.

/s/ JOHN M. DICKERMAN.

Subscribed and sworn to before me this 15th day of March, 1947.

[Seal] /s/ RUTH B. HAMMOND,
Notary Public.

My Commission Expires Feb. 28, 1952.

Certificate of Service

It Is Hereby Certified that a copy of the foregoing petition for leave to intervene has this day been served upon each party to the above-entitled proceeding.

Dated at Washington, D. C., this 15th day of March, 1947.

/s/ JOHN M. DICKERMAN,
Attorney for the Air Line Pilots' Association, International.

Filed March 7, 1947. [68]

United States of America, Civil Aeronautics Board
[Title of Cause.]

REPORT OF PREHEARING CONFERENCE

Exceptions, if any, to matters in this report must be filed with Examiner Thomas L. Wrenn, and served upon all other counsel within 5 days of the date of service shown above. [126]

Western-United Route No. 68 Sales Agreement
March 19, 1947

Western Air Lines, Inc., and United Air Lines, Inc., have applied, Docket No. 2839, under sections 401, 408, and 412 of the Civil Aeronautics Act, for an order approving an agreement dated March 6, 1947, for the sale of certain property and the transfer and amendment of the certificate of public convenience and necessity for route No. 68. Pursuant to notice to all interested parties, a prehearing conference in the proceeding was held in Room 1508, Commerce Building, at 10 a.m., March 19, 1947, at which the following were present or had appearances entered:

Appearances:

HUGH W. DARLING,
TERRILL C. DRINKWATER,
J. J. TAYLOR, and
R. C. KINSEY,
For Western Air Lines, Inc.

JAMES FRANCIS REILLY,
For United Air Lines, Inc.

HOWARD C. WESTWOOD,

For American Airlines, Inc.

LESLIE CRAVEN,

For Continental Air Lines, Inc.

S. W. RICHARDSON, and

C. E. LEASURE,

For Northwest Airlines, Inc.

JOHN W. CROSS, and

PHILLIP SCHLEITT,

For Mid-Continent Airlines, Inc.

ELIHU SCHOTT,

For Pan American Airways, Inc.

GEORGE A. SPATER,

C. E. FLEMING,

HENRY P. BEVAN, and

J. C. STRATTON,

For Transcontinental and Western Air,
Inc.

JOHN M. DICKERMAN,

For Airline Pilots' Association.

JOHN H. PRATT,

For Minneapolis-St. Paul Airport Commis-
sion.

JAMES L. HIGHSAW, JR., and

WILLIAM L. KENNEDY,

Public Counsel, and

CHARLES A. BALLOU, JR.,

Accounting and Rates Division, Civil Aero-
nautics Board.

TWA, Airline Pilots' Association, and Pan American had petitions for leave to intervene on file, American filed the day of the conference, and Northwest, Mid-Continent, and Twin Cities Airport Commission stated that petitions would be filed within five days from the date of the prehearing conference.

Public Counsel presented a statement of issues raised by the agreement, which is attached as appendix A, a tentative list of evidence requested of Western and of United, and a proposed stipulation. The applicants agreed to furnish the exhibits requested, some of which were modified and enlarged, together with certain additional items requested by some of the intervenors, including a copy of the press release announcing the agreement between Western and United. TWA, Continental, and Pan American suggested that the record in the Los Angeles-Denver case, [127] Docket No. 519, et al., be incorporated in the record in this proceeding. There was some opposition to this proposal on the grounds that counsel was not familiar with the contents of that record. It was agreed that parties will submit to public counsel a statement showing that part of the record in Docket No. 519, which they desire incorporated in this proceeding, after which public counsel will undertake to prepare a stipulation covering such material for submission to the parties. Counsel for Mid-Continent will examine the record of the North Central case, Docket No. 415, et al., to determine if Mid-Continent will request parts of it incorporated in the record of this proceeding.

There were a number of questions about Exhibit A, referred to in the Western-United Agreement. Western stated that it had not been completed, but would be available within a few days, at which time copies would be sent to all parties present.

A summary of the position and views stated by petitioners to intervene follows:

Pan American—Counsel stated that the Western-United agreement will have some impact upon Pan American's domestic route application, Docket No. 1803. While Pan American will probably oppose the agreement on this ground, it will not contend that this proceeding should be postponed until after Docket No. 1803 is decided. Pan American also believes that the agreement will have some effect upon proposals for competitive service to Hawaii, although the latter is of secondary importance in its view. Counsel stated that Pan American considers that the retention of Western as a neutral feeder to its Los Angeles-Hawaii service is of importance.

Northwest—Its interest lies principally in the course that will be followed with respect to Inland if the agreement is approved. Northwest also feels that the agreement involves the peddling of certificates, and counsel expressed the opinion that action similar to that taken by the Board in ordering investigations of Northeast and Colonial may be a proper action with respect to Western. Northwest feels that the proposed transaction is contrary to public policy and to the Civil Aeronautics Act. Northwest indicated that it will probably support

the position of the Twin City Airport Commission with respect to the desirability of one-carrier service to Los Angeles.

American—Counsel for American was unable to state any position with respect to the price involved in the transaction and probably will not be able to do so prior to the hearing. American is also interested in the effect which the proposed transaction will have on the remainder of Western's system and is interested in general questions involved: (a) How should the air transport map be remade? Should any consideration be given to pendency of bankruptcy of a carrier? (b) Should the Board [128] confer with carriers on proper consolidations, mergers, and route applications, and state a price? On the question of whether it is in the public interest for United to operate from Denver to Los Angeles, American stated that it had not opposed the merger of United and Western, or the application of United in the Denver-Los Angeles case, Docket No. 519, et al. American stated that a United route from Denver to Los Angeles makes sense from the standpoint of a national transportation system but that it makes more sense for American to be extended to San Francisco as it would provide more new service to San Francisco than United would to Los Angeles. It was American's position that if United is extended to Los Angeles and American is not extended to San Francisco, the result will be grotesque for United will be completely dominant in the west. On the question of

United receiving the Denver-Los Angeles route as a part of its route 1, American stated that if United is to have the Denver-Los Angeles route, the public should have the convenience of nonstops to and from points east of Denver. In stating this position, American referred to its pending application to consolidate its routes 30 and 4, and to current data showing that its Los Angeles-Chicago traffic as equaling that of TWA and exceeding United.

TWA—It is the position of TWA that the sale is adverse to the public interest, will create monopoly within the meaning of the Act, and will adversely affect carriers not a party to the transaction. TWA referred to the fact that it was an applicant in the original case, wherein Western represented that the route was essential to its continued existence, that since Western has now taken the opposite view the Board should not be limited to whether United can buy and Western can sell, but should be free to reexamine the mandate of public interest under the Act. Counsel requested that TWA applications, Dockets Nos. 1840 and 1841, be consolidated and heard in this proceeding. United opposes this request but if granted desires its application, Docket No. 2284, consolidated in this proceeding.

Continental—Counsel for Continental stated he had not been able to study the sales agreement and wanted time to study whether Continental would be affected more by United serving Denver-Los Angeles than by any other carrier. **He stated that the** application raises the point as to how to stabilize

smaller carriers; whether by enlargement and extension, or by consolidation. He stated that Continental has an interest in the formation of route structure which destroys routes of a carrier with which Continental conceivably could merge.

Mid-Continent—At this time, Mid-Continent does not oppose or favor the sale and may continue to maintain that neutral position. Its chief interest is in Inland, particularly the Twin Cities-Denver route. Counsel called attention to Mid-Continent's petition in Docket No. 2844, requesting suspension of Inland's recent extension from Huron to the Twin Cities. Counsel stated that he was not asking consolidation of that application with this [129] proceeding.

Minneapolis-St. Paul Airport Commission—The Commission will oppose the sale on the grounds that its approval will result in a two-carrier service instead of the one-carrier service from the Twin Cities to Los Angeles made possible by the recent extension of Inland to the Twin Cities in the North Central case.

Airline Pilots' Association—Counsel stated that his organization would seek as a condition of approval of the transaction that United take over the Western pilots now flying the route and accord them the seniority rights they now hold. Counsel indicated that he felt that Western and United and the pilots would work out some arrangement prior to a decision in this proceeding. Both Western and

United expressed willingness to confer with the pilots on the matter and it was suggested that such conference be held. In response to an inquiry by counsel for United as to whether pilots contracts covered acquisition of a route, counsel stated that he did not think contracts alone were controlling.

Public Counsel—No position with respect to the transaction was stated. Public Counsel is in favor of expediting the proceeding as much as possible principally because of the financial aspects.

In response to inquiries as to the relationship between the sales agreement and Western's financial position, Western's president stated that the sales agreement is a sound thing for Western irrespective of its financial condition and that Western's belief in this principle did not arise because of finances. He stated that as a result of the transaction, Western's financial condition has been and will be improved, but that the transaction was not a forced sale.

Counsel for TWA stated that he was on the same day filing a motion petitioning the Board to reopen the Los Angeles-Denver case, Docket No. 519, et al. Continental stated it would support the motion; Western opposed the motion; no other party indicated any position, except that American was disturbed by the dangers involved in the precedent which would be set by favorable action on the motion.

The date suggested by parties for exchange of exhibits ranged from 10 days from the date of the

conference in the case of Western to at least 60 days urged by TWA and Continental. Counsel for United urged prompt hearing stating that the case called for a little detailed preparation by interveners, that the issues were comparatively simple, with price being the major issue. Counsel for TWA stated that he regarded monopoly and the question of general Board policy as issues of greater importance than price. Counsel for Northwest stated he would be ready for hearing 20 days from the date of the conference, otherwise requested that it be heard after completion of the Pacific-Northwest-Hawaii hearing, scheduled to begin April 21. Pan American, Mid-Continent, and American stated they would be agreeable to any date selected. Western urged a quick hearing; Public Counsel stated he would like to have 2 weeks between the date exhibits were [130] received and the date of hearing. Both Western and United stated that their exhibits could be completed within 2 or 3 weeks from the date of the conference, and as soon as completed, they would furnish copies to the parties without waiting for the date of exchange in effort to expedite the proceeding.

Upon consideration of the foregoing and of future commitments of the several parties, the following dates have been designated for subsequent steps in this proceeding:

Exchange of exhibits—on or before April 24,
1947.

Hearing—May 5, 1947.

There was discussion of the applicants' request for expedited procedure in this case. Several possible methods available under the Administrative Procedure Act were suggested, but no agreement was reached with respect to any procedure. The examiner stated that a decision on the method of procedure would be made at the time of the hearing.

/s/ T. L. WRENN,
Examiner. [131]

Appendix A

Western-United Agreement—Docket No. 2839

Discussion of Issues

An examination of the agreement filed with the Board by the parties would indicate that it gives rise to the following issues under the Civil Aeronautics Act:

1. The agreement for the transfer of Western's certificate to operate over Route No. 68 must meet the test of section 401(i) of the Civil Aeronautics Act as being consistent with the public interest.

2. The agreement for the acquisition of Western's Route No. 68, and certain property and equipment of Western's may require approval under section 408(a)(2) of the Civil Aeronautics Act as the purchase of a substantial part of Western's property. If so, two questions arise:

- a. Is the purchase inconsistent with the public interest?

- b. Will the purchase result in the creation

of a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party thereto? [132]

3. Application is made also by the parties under section 412 of the Act. It would appear that the applicability of that section may be limited to the provisions of paragraph Six of the agreement relating to a loan from United to Western. Section 412 would raise two questions:

a. Is the agreement, insofar as section 412 is applicable thereto, in violation of the Civil Aeronautics Act?

b. Is the agreement, insofar as section 412 is applicable thereto, adverse to the public interest?

4. The test of the public interest under sections 401(i), 408, and 412 of the Civil Aeronautics Act relates primarily to the policy factors set forth in section 2 of the Act, and the agreement must be judged in light of those factors.

5. Amendment No. 1 of the application of Western and United requests an amendment of United's existing certificate for Route No. 1 in the event of approval of the agreement, so that Route No. 68 will become a part of Route No. 1. This raises a question of the public convenience and necessity under section No. 401(h) of the Act.

Tentative List of Evidence Requested by Public
Counsel to Be Furnished by Applicant

I. Western Airlines

(1) Financial Position

- (a) Balance Sheet as of latest date possible;
- (b) Profit and loss statement for a representative recent period;

(2) Describe briefly the business operations of Western as of March 1, 1947, including any aeronautical or other activity not covered by certificates of public convenience and necessity;

(3) Brief description of physical assets now held or being acquired, including flying equipment and ground facilities (maintenance, navigation and communication, etc.);

(4) State to whom and of what amounts Western is indebted, including manner in which debt is evidenced, whether debt is secured or guaranteed, and if so, how and by whom;

(5) Statement of operations for a representative recent period of operations by routes (a) passengers carried, (b) Revenue passenger miles flown, (c) revenue, (d) costs;

(6) Number of passengers by points of origin and destination exchanged with United at Denver and Salt Lake during representative recent period;

(7) Property to be transferred to United under agreement;

- (a) Tangible property by item;

Date of purchase, original cost, valuation for purpose of sale.

(b) Statement of each item of intangible property included in sale, value placed thereon for purpose of sale, and the basis of such valuation.

(8) Minutes of Directors Meetings or any committee thereof relating to or discussing sale;

(9) Certified copy of authorization of directors and/or stockholders for sale;

(10) Statement as to any existing negotiations and contracts for sale of any other property, tangible or intangible (including other routes) or present or contemplated plans, if any, for such sale (including Inland);

(11) Future use of personnel now assigned to operation of Route No. 68;

(12) Correspondence with any individual, partnership, or corporation other than United relating to transaction;

(13) List of banks, insurance companies, or other financial institutions holding stock in Western.

II. Relations Between the Applicants

(1) (a) Copies of all agreements, formal or informal, oral or written providing for or incidental to:

(A) Transfer of certificate of public con-

venience and necessity for Route 68 from Western to United;

(B) Transfer of any other property—tangible or intangible—from Western to United;

(C) Loan of money by United to Western.

(b) Copies of all other agreements, formal or informal, oral or written, supplementing or subsidiary to contract or contracts for transfer of the certificate for Route 68, any other property, tangible or intangible, or loan of money;

(2) Statement setting forth details of negotiations for sale of Route No. 68, and other property involved in agreement.

(3) Statement of post-sale relationships contemplated between Western and United if agreement is approved.

(4) Correspondence between United and Western relating to transaction. (Including officers and directors.)

III. United Air Lines

(1) Financial Position.

(a) Balance sheet as of most recent date possible;

(b) Profit and loss statement for representative recent period;

(c) Existing or contemplated plans for financing—copy of any statement or application filed with any stock exchange, the Securities and Exchange Commission or any other

governmental agency in connection with such financing;

(d) Banks, financial institutions, or underwriters participating in any financing.

(2) List of banks, insurance companies, financial institutions covering stock in United.

(3) Balance sheet showing the financial condition of United after the consummation of the agreement, if approved.

(4) Number of passengers for representative recent period interchanged with Western at Denver.

(5) United's plans for the operation of Route 68.

(6) Minutes of directors meetings or committees thereof relating to or discussing the transaction.

(7) Copy of authorization of directors and/or stockholders for transaction.

(8) Correspondence with any individual, partnership, or corporation other than Western relating to transaction. (Including officers and directors.)

(9) Statement showing amount of diversion resulting to any air carrier by reason of sale of Route No. 68, and consolidation with Route No. 1.

Note: Statement requested from Western under Item (4) as to operations should include a statement as to all operations over Route No. 68 since inauguration of service, particularly development expense.

Proof of Service

I hereby certify that on March 27, 1947, this document was:

1. Posted on the official bulletin board.
2. Served on all parties on attached list.
3. Served on all mailing lists.

/s/ C. F. WILLIAMS,
Chief, Docket Section.

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J. C. Stratton, c/o TWA, Hangar # 2, Wash. National Airport, Wash., D. C. [136A]

Special Messenger:

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Bulletin Board.

Docket Section.

Stough.

Leasure.

Examiner: Wrenn, B-101.

Public Counsel: Highsaw, B-38; Kennedy, B-38.

Charles A. Ballou, Jr., B-74.

No Special Mail Cards.

Inter-Office Distribution. [136B]

United States of America, Civil Aeronautics Board

[Title of Cause.]

TRANSCRIPT OF HEARING

Tuesday, May 20, 1947

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m., before Thomas L. Wrenn, Examiner.

Appearances:

HUGH W. DARLING,
737 Pacific Mutual Building,
Los Angeles, California,

Appearing on Behalf of Western Air
Lines, 135 South Doheny Drive, Beverly Hills, California.

JAMES FRANCIS REILLY,
726 Jackson Place, N.W.,
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Appearing on Behalf of United Air
Lines, Inc., 5959 South Cicero Avenue, Chicago 38, Illinois.

H. C. WESTWOOD,
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Appearing on Behalf of American Air
Lines, Pershing Square, New York,
N. Y.

SHELDON G. COOPER,
701 Crocker Building,
San Francisco, California;

C. EDWARD LEASURE,
Woodward Building,
Washington, D. C., and

S. B. REDMOND,
Equitable Building,
Denver, Colorado,

Appearing on Behalf of Continental
Air Lines, Stapleton Airfield, Den-
ver, Colo.

PHILIP SCHLEIT, and
JOHN W. CROSS,
1625 K. Street, N.W.,
Washington, D. C.,

Appearing on Behalf of Mid-Continent
Airlines, Kansas City.

SETH RICHARDSON,
815 15th Street, N.W.,
Washington, D. C.,

Appearing on Behalf of Northwest
Airlines, St. Paul, Minnesota.

J. HOWARD HAMSTRA,
135 East 42nd Street,
New York, N. Y.,

Appearing on Behalf of Pan American
Airways, Inc., 135 East 42nd Street,
New York, N. Y.

GEORGE A. SPATER, and
JOSEPH S. ISEMAN,

25 Broadway, New York, N. Y.,

Appearing on Behalf of Transcon-
tinental & Western Air, Inc., 101
West 11th Street, Kansas City Mis-
souri.

JOHN H. PRATT,

905 American Security Building,
Washington, D. C.,

Appearing on Behalf of Minneapolis-
St. Paul Metropolitan Airport Com-
mission, 2429 University Avenue, St.
Paul, Minnesota.

FRED O. MUNCH,

3145 West 63rd Street,
Chicago, Illinois,

Appearing on Behalf of Air Line
Pilots' Association, 3145 West 63rd
Street, Chicago, Illinois.

JAMES L. CRAWFORD,

1015 Vine Street,
Cincinnati, Ohio, and

HARTMAN BARBER,

Room 301, 10 Independence Ave., S.W.,
Washington, D. C.,

Appearing on Behalf of the Brother-
hood of Railway Clerks, 1015 Vine
Street, Cincinnati, Ohio.

GLEN B. EASTBURN,
1151 South Broadway,
Los Angeles 15, California, and

JOHN M. COSTELLO,
1411 Pennsylvania Avenue,
Washington 4, D. C.,

Appearing on Behalf of the Los Angeles Chamber of Commerce.

JAMES L. HIGHSAW, JR., and
WILLIAM F. KENNEDY,

Public Counsel. [163]

Proceedings

Mr. Crawford: Mr. Examiner, at this time, may we have our appearance entered? My name is James L. Crawford, and this is Mr. Hartman Barber.

Examiner Wrenn: For whom are you appearing?

Mr. Crawford: Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees.

Examiner Wrenn: I didn't get all that.

Mr. Crawford: Just refer to us as the Brotherhood of Railway Clerks.

Examiner Wrenn: You are entering an appearance under——

Mr. Crawford (Interposing): 285.6 of Paragraph (a). [164]

TERRELL C. DRINKWATER

the witness on the stand at the time of taking the noon recess, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Highsaw: [239]

* * *

Q. Turning to the question of the use of the personnel employed on route 68.

A. Yes, question 8 on page 10.

Q. Is that page 10? A. Yes.

Q. When you say there that you intend to absorb substantially all of the personnel, I just wondered why the qualification.

A. Of substantially?

Q. Yes.

A. Because we have too many people in most places in Western Airlines, and we are trying to reduce our overhead, and reduce the number of employees wherever we can. I did not want to say that we would absorb them all because as we get further into the situation, we may find we have too many folks, but generally speaking we know we will need at least 14 flight crews to fly between San Francisco and Seattle, to say nothing of Mexico City. We know we will [267] need larger station complement at Portland, for instance, than we have at Grand Junction, and we know we will need station personnel at Seattle, in number and experience and

(Testimony of Terrell C. Drinkwater.)

classifications which will certainly be analogous to our present personnel in Denver.

Q. You estimate what percentage of your personnel will probably be taken over?

A. Percentage of what personnel?

Q. The personnel on route 68 now.

A. You mean Denver, Grand Junction and the pilots?

Q. Yes.

A. All of the flight crews, 100 per cent of the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, we are going to give them a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Airlines, we would take care of all of these people.

Q. Would this reduction in the personnel on route 68 be made regardless of whether the sale were approved?

A. Yes. It is the same program that is going on on routes 13, 19, 63, 52 and 6.

Q. Then actually you intend to absorb all of the personnel that you would have kept anyway?

A. Subject to that qualification, yes.

Q. If you are unable to absorb any of the personnel who might be left jobless as the result of this sale, do [268] you have any plans with respect to taking care of that personnel?

(Testimony of Terrell C. Drinkwater.)

A. Well, there won't be any. The last question covers that.

Q. Well, you have no plans, then, because you don't contemplate any?

A. That is right. As a matter of fact, we will need more people probably. I am sure we will need more people. We will need more people to staff up in Portland and Seattle than we presently have in Denver and Grand Junction, let us put it that way.

Q. Have you discussed with United at all the question of taking over any of Western's personnel?

A. No.

Q. How would you feel about the Board putting conditions on any order of approval that it might issue relating to severance pay and cost of people moving who might be dropped as the result of this route transfer?

A. Well, I would not think that the Board would care to state how many employees an airline should have at a given station. It seems to me that would be a matter within the discretion of management of an airline.

But if the Board sees fit and thinks that it has the power to put such restrictions in any approval, why, we would not object to it, except on the matter of broad principles, as I have just said, that I don't think that the Board should undertake to tell each carrier how many people they should put at each station or for what purpose.

Examiner Wrenn: Is that what you meant, or did you [269] have reference to personnel who

(Testimony of Terrell C. Drinkwater.)

might want to be transferred, and there would be moving expense?

Q. (By Mr. Highsaw): I have both in mind.

A. We pay the moving expenses. Every airline in the country does that. When you transfer them, you pay their moving expenses.

Q. With respect to any personnel that was dropped as the result of the route sale, you don't think the Board should put any restrictions on that, but you would accept them if any conditions were put in.

A. Well, it depends on what they were, but the question is entirely academic because there are not going to be any personnel dropped as the result of route sale. There may be some dropped because they are incompetent, or we have too many folks, but not any dropped because of the route sale.

Q. These questions that I have regarding the balance sheet, and everything, I assume it would be more profitable to go into those with Mr. Taylor.

A. Yes.

Mr. Highsaw: I believe that is all, Mr. Examiner.

Examiner Wrenn: Airline Pilots Association, do you have any questions?

Cross-Examination

By Mr. Munch:

Q. This may seem repetitious in view of what

(Testimony of Terrell C. Drinkwater.)

has been brought out, but what now is your position regarding the pilots on this division? [270]

A. As this statement here reads, Mr. Munch, we have every intention of keeping every one of the 14 flight crews presently operated on route 68 in the event the Board approves this transaction, and transferring them, subject to their seniority list and their rights to bid, to the extended operation of route 63, San Francisco-Portland-Seattle.

I have had a series of meetings with all of our pilots, three different meetings, in order to meet with everybody in the flight department, and have gone over this whole thing carefully with them, and explained that if the Board granted our extension of route 63 to Seattle, that was our intention.

There was no question raised about that program in the event that the Board granted that extension.

The Board yesterday did grant it, so I assume that takes care of your question.

Q. In other words, there are more or less guarantees.

A. That is true, and as a matter of fact, we will need more flight crews than the 14. [271]

* * *

Mr. Crawford: I wanted to make this statement, Mr. Examiner. This morning when we announced our appearance, that we were appearing under Section 285, which is paragraph (A), I don't think at that time that we stated our position although

(Testimony of Terrell C. Drinkwater.)

I think it was understood that our position is that the Civil Aeronautics Act confers authority upon the Board to impose conditions to protect the employees who may be adversely affected.

I notice in paragraph (A) it provides that coming under this Section, we may also suggest questions or interrogatories to Public Counsel. Mr. Highsaw has propounded substantially the questions we would have propounded but in addition it also provides that we may present any evidence which is relevant to the issue. In lieu thereof, I ask this privilege that we may file a memorandum or brief in which we can state in more detail the position which we take in support of our position the same as that of the other parties.

Examiner Wrenn: All right, Mr. [289] Crawford.

* * *

W. A. PATTERSON

was called as a witness for and on behalf of United Air Lines, Incorporated, and having been duly sworn was examined and testified as follows: [290]

Q. On the subject of employees of Western engaged on Route 68, is it the intention of United to hire any of these employees?

A. No; and I judge from Mr. Drinkwater's testimony yesterday that there is no problem, and I certainly would feel that there was no problem because with this Seattle extension he has just

(Testimony of W. A. Patterson.)

gotten, I would judge that he needs more people than he has for that route.

If he hadn't been awarded that decision, we would [347] probably have a problem here today, but I don't see it. [348]

* * *

By Mr. Munch:

Q. Mr. Patterson, I take it your position with regard to these pilots to you presents no problem at all; is that right? A. It never did.

Q. Is United assuming any of the obligations of Western in this agreement?

A. No; we assume no obligations of Western in the agreement.

Q. In the course of your negotiations with Mr. Drinkwater, did you ever consider that it might be well to consult the Air Line Pilots Association?

A. Yes. I talked to the council man in Los Angeles of the Air Line Pilots Association, chairman of the council of the United Air Lines and told him what the transaction was all about and he, in turn reported to headquarters.

Q. You know definitely he did report to headquarters?

A. Yes; and I have a letter from Mr. Bencke asking for my views, and I expressed my views to Mr. Bencke. [349]

* * *

FRED O. MUNCH

was called as a witness, for and on behalf of Air-line Pilots Association, and having been duly sworn was examined and testified as follows:

Direct Examination

The Witness: I wish to make a statement which will clarify the position that the Air Line Pilots Association takes in the matter of the purchase of Route 68.

We feel that regardless of whether it is a merger, purchase, consolidation or any other form of acquisition by one air line of another air line or a part thereof, the air line pilots flying on such air line or part thereof must not have their employment or seniority rights disturbed, impaired, or destroyed in any way. In every case in the past where there has been a merger, acquisition, or consolidation [433] of air lines, or parts thereof, the pilot problem involved, both as to protection of seniority rights and continued employment, has been dealt with in such a manner that employment and seniority rights were not affected and were left unimpaired.

We feel that there shouldn't be any difference or distinction made in the handling of the pilots' rights in this purchase of Route 68 by United. Here we have a large part of an air line that is taken over by another air line on which part there are 15 first pilots and 15 co-pilots and one reserve crew—all of whom will be directly affected by this purchase and which in turn will affect all

(Testimony of Fred O. Munch.)

Western pilots. It is only natural for the purchaser to feel that there is no pilot personnel problem involved but this assumption does not take into consideration the rights of the pilots involved.

The stand of the Air Line Pilots Association is that whether it be by purchase or any other means of acquisition, the pilots must be acquired in the same sense that all of the assets and liabilities are acquired or it certainly cannot be in the public interest.

The Air Line Pilots Association has no desire to oppose this purchase of Route 68 by United provided the pilots and co-pilots now flying this division are taken over by United and given seniority as of the date of their original employment with Western, and moreover, that such pilots shall not be dealt with unfairly, and that their continued employment with the purchasing company shall not be endangered or prejudiced in any manner. If this purchase [600] is approved without the rights of the Western pilots being safeguarded then it will amount to a wrongdoing that will establish a precedent that will do untold harm.

The pilots of both the companies concerned, United and Western, are represented by the Air Line Pilots Association, and both groups are covered by employment agreements made pursuant to the provisions of the Railway Labor Act. The position that the pilots association takes in this matter is not inconsistent with these employment agreements.

(Testimony of Fred O. Munch.)

Considering for a moment the legal aspects of the position we are taking, you will find that Section 401 (L), paragraph 4, of the Civil Aeronautics Act requires that:

“It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with Title II of the Railway Labor Act as amended.”

In turn Title II of the Railway Labor Act extends the provisions of Title I except Section 3 to air carriers—and Section 2 of Title I states:

“It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees [601] thereof.”

Pursuant to and in furtherance of the objectives of this legislation, United, Western and the respective pilot groups represented by the Air Line Pilots Association have entered into employment agreements.

Our employment agreements state:

Section 17 (a) Seniority of a pilot shall be based upon the length of service of a pilot with

(Testimony of Fred O. Munch.)

the company or with other companies whose operations have been taken over by the company, prior to the signing of this agreement.

(b) Seniority shall begin to accrue from the date a pilot is first assigned to a division for air line flying duty and shall continue to accrue during such period of duty.

(c) Seniority shall govern all pilots in case of promotion and demotion, their retention in case of reduction in force, their assignment or reassignment due to expansion or reduction in schedules, their re-employment after release due to reduction in force, and their choice of vacancies, provided that the pilot's qualifications are sufficient for the conduct of the operation and in the event that a pilot is considered by the company not to be sufficiently qualified the company shall immediately furnish such pilot written reasons therefor. This section shall apply unless otherwise specifically excepted by some other provision in this agreement.

In view of the existing employment agreements, the existing legislation, and the nature of the property right involved, we feel that this is a very important issue and one that must be decided and agreed upon by both groups [602] of pilots as well as United and Western Air Lines. Because of this, we ask that the Board hold the entire matter in abeyance until a fair and equitable solution has been worked out to the satisfaction of the pilots and companies. We estimate that to do so will take a minimum of 30 and possibly 60 days.

(Testimony of Fred O. Munch.)

This will not work a hardship on the public for this is not a matter of beginning a new and much needed service but purely the transfer of the management of an existing operation.

In the event the Board cannot see fit to hold this matter in abeyance pending a fair solution to this pilot problem, we can then take but one position and that is the purchase of Route 68 should not be approved. In short, we are asking for an ample opportunity for the provisions of the C.A.A. and the R.A.L. to be carried out both in letter and in spirit.

Examiner Wrenn: Mr. Darling?

Mr. Darling: I have a few questions.

Cross-Examination

By Mr. Darling:

Q. Mr. Munch, regarding this statement which you have just made for the record, did you consult the Western Air Lines Pilots?

A. The President of the Association has consulted with them.

Q. But you don't know the outcome of that consultation? A. No, I do not.

Q. Therefore, you do not know whether or not the [603] statements which you have just read into the record correctly reflect the wishes or the will of the Western Air Lines pilots who are presently assigned to Route 68?

A. That statement is the position of the Asso-

(Testimony of Fred O. Munch.)

ciation and Western's pilots are members of that Association.

Q. To be a little more specific, you do not know whether the statement does reflect the wishes and the will of a majority or any of Western's pilots presently assigned to Route 68? A. No.

Mr. Darling: That is all.

Examiner Wrenn: Any further questions?

Mr. Reilly: I have one or two questions.

Cross-Examination

By Mr. Reilly:

Q. Mr. Munch, do you know whether or not there was a meeting of the Executive Council of the Air Line Pilots Association instructing that this position be taken? A. I do not know.

Q. Do you know whether the UAL counsel in California was consulted with respect to the position of Mr. Behncke of the Air Line Pilots Association in this matter?

A. That I do not know either.

Q. You don't know whether there was a meeting of the Executive Council specifically on this question, do you? A. No, I do not know.

Q. When did Mr. Behncke authorize you to state this position?

A. Monday, May 19. [604]

Mr. Reilly: That is all.

Mr. Darling: May I ask one or two more questions?

Examiner Wrenn: Yes.

(Testimony of Fred O. Munch.)

Further Cross-Examination

By Mr. Darling:

Q. Are you aware of the fact that Mr. Drinkwater, the President of Western Air Lines has had a conference with the pilots of Western Air assigned to Route 68 and the pilots have indicated a very strong indication that they would be very happy to transfer to Route 68 and operate up to Seattle—Route 63?

A. As I recollect, the testimony, he did mention that fact.

Q. But you are not aware of that fact?

A. I am not aware of whether the pilots have agreed to that.

Examiner Wrenn: If there are no further questions the witness may be excused.

* * *

Received May 23, 1947. [605]

WESTERN EXHIBIT WT-1

Docket 2839

Direct Testimony of Terrell C. Drinkwater

1. Q. When did you become president of Western Air Lines, Inc.? A. January 1, 1947.

2. Q. Prior to that time, had you ever been an officer or employee of Western Air Lines?

A. No.

3. Q. Briefly, what airline experience had you had prior to your association with Western Air Lines?

A. From September, 1942, to September, 1944, I was Executive Vice President, General Manager and Director of Continental Air Lines. Prior to that I had for some time been a Director and General Counsel of Continental Air Lines. From September, 1944, to January, 1947, I was Vice President of American Airlines and for a portion of that period was likewise Vice President and a Director of American Overseas Airlines, Inc.

4. Q. Did you have anything to do with the formulation of policy for Western Air Lines prior to the time you took office as its president?

A. No. [806]

* * *

8. Q. What will be done with the personnel now assigned to the operation of Route 68 when the Board approves this agreement?

A. We intend to absorb substantially all the personnel presently assigned to Route 68 in the operation of a route between Seattle and San Francisco if the Board sees fit to award us that extension. We presently have 14 flight crews operating Route 68 between Denver and Los Angeles and we estimate that we need at least this number of flight crews to provide service to Portland and Seattle to say nothing of our contemplated service to Mexico City, which will require additional flight

crews. With respect to ground personnel in both Denver and Grand Junction, aside from those personnel presently in Denver and devoting their attention to the Inland operation, we expect to be able to utilize such personnel in Portland or Seattle or in other places on Routes 13, 19, 52 and 63. [815]

UNITED EXHIBIT UAL-T1

Docket No. 2839

Direct Testimony of United's Witnesses

In the Matter of:

The Application of WESTERN AIR LINES, INC., and UNITED AIR LINES, INC., Under Sections 401, 408 and 412 of the Civil Aeronautics Act of 1938, as Amended, for an Order Approving an Agreement for the Sale of Certain Properties and the Transfer and Amendment of the Certificate of Convenience and Necessity for Route No. 68.

Direct Testimony of W. A. Patterson, President,
United Air Lines, Inc.

Cab Docket No. 2839

* * *

Q. Are there any agreements, formal or informal, oral or written, supplementing or subsidiary to the contract between United and Western, dated March 6, 1947, a copy of which is Exhibit U-4 in this proceedings? A. No. [1077]

* * *

Before the Civil Aeronautics Board

[Title of Cause.]

PETITION FOR AN ORDER UNDER SECTION 8(a) OF THE ADMINISTRATIVE PROCEDURE ACT AND UNDER SECTION 285.8(e) OF THE RULES OF PRACTICE OF THE CIVIL AERONAUTICS BOARD FOR AN ORDER OMITTING A RECOMMENDED DECISION OF THE EXAMINER OR A TENTATIVE DECISION OF THE BOARD AND CERTIFYING THE ENTIRE RECORD TO THE BOARD FOR INITIAL DECISION WITHOUT [1240] BRIEFS

Petitioner, Western Air Lines, Inc., respectfully represents: [1241]

* * *

IV.

The facts and circumstances, contained in or implicit from the record of the above-captioned proceeding, which support favorable findings and a favorable order in response to this petition are:

* * *

(e) On May 19, 1947, in the West Coast Case, Docket No. 250, Petitioner's Route 63 between Los Angeles and San Francisco, California, was amended by adding an extension to Seattle, Washington, via Portland, Oregon. Petitioner intends to transfer to the operation of extended Route 63, flight crews now assigned to Route 68. (Tr. p. 381)

This will obviate any restiveness among Petitioner's flight crews and will enable Petitioner to take advantage of the benefits stemming from the retention of its own employees. Petitioner intends to activate the new extension of Route 63 expeditiously and any delay in the initial decision will be prejudicial to Petitioner's operations and planning and adverse to the public interest. [1242]

* * *

Respectfully submitted,

WESTERN AIR LINES, INC.,

By /s/ TERRELL C. DRINKWATER,
President.

GUTHRIE, DARLING &
SHATTUCK,

Attorneys for Western Air
Lines, Inc.

Filed May 23, 1947. [1243]

United States of America Civil Aeronautics Board
[Title of Cause.]

ORDER No. E-598

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 6th day of June, 1947

The applicants, Western Air Lines, Inc., and
United Air Lines, Inc., having filed motions for an

order under section 8(a) of the Administrative Procedure Act and Section 285.8(c) of the Board's Economic Regulations certifying the record in this proceeding to the Board for initial decision and for other relief; and

It Appearing to the Board, That no one of the interveners in this proceeding has objected to so much of the foregoing motions as requests the omission of a recommended decision by the Examiner and of a tentative decision by the Board and of exceptions thereto; and

The Board finding upon the record in this proceeding that the due and timely execution of its functions imperatively and unavoidably requires the omission of a recommended decision by the Examiner and of a tentative decision by the Board and of exceptions thereto; [1258]

It Is Ordered:

1. That the Examiner in this proceeding be and he hereby is directed to certify the entire record herein to the Board for initial decision;
2. That a recommended decision by the Examiner and a tentative decision by the Board and exceptions thereto be and they hereby are omitted;
3. That the applicant, interveners and Public Counsel be and hereby are permitted to file with the Board proposed findings and conclusions and supporting reasons therefor, or briefs in lieu of such proposed findings and conclusions and supporting reasons on or before a date designated by the trial Examiner;

4. That oral argument before the Board be held at a time hereafter to be announced; and

5. That no exceptions will be received to the initial decision of the Board.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary. [1259]

Proof of Service

I hereby certify that on June 6, 1947, this document was:

1. Posted on the official bulletin board.
2. Served on all parties on attached list.
3. Served on all mailing lists.

/s/ C. F. WILLIAMS,
Chief, Docket Section.

Registered:

Western Air Lines, Inc., Att: Paul E. Sullivan,
135 S. Doheny Drive, Beverly Hills, Calif.

United Air Lines, Inc., Att: S. P. Martin, 5959
S. Cicero Ave., Chicago 38, Ill.

Regular:

American Airlines, Inc., Att: C. W. Jacob,
1437 K St., N. W., Wash., D. C.

T. W. A., Att: Secretary, 101 W. 11th St.,
Kansas City 6, Mo.

Pan American Airways, Inc., Att: Henry J.
Friendly, 135 E. 42nd St., New York, N.Y.

Mid-Continent Airlines, Inc., Att: J. W. Miller,
102 East 9th St., Kansas City, Mo.

Northwest Airlines, Inc., Att: A. E. Floan,
1885 University Ave., St. Paul, Minn.

Minneapolis-St. Paul Airport Commission, c/o
Albert Beitel, Morris, Kix, Miller & Baar,
American Security Bldg., Wash., D. C.

Air Lines Pilots Assn., Att: David L. Bencke,
3145 E. 53rd St., Chicago, Ill.

Continental Air Lines, Inc., Att: Robert Purcell,
Stapleton Airfield, Denver, Colo.

Miss Carlene Roberts, 1437 K St., N. W.,
Wash., D. C.

Howard C. Westwood, 701 Union Trust Bldg.,
Wash., D. C.

Edwin McElwain, 701 Union Trust Bldg.,
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George A. Spater, Chadbourne, Wallace, etc.,
25 Broadway, New York, N.Y.

C. E. Fleming, c/o T. W. A., Hangar #2,
Washington National Airport, Wash., D. C.

Henry P. Bevan, Chadbourne, Wallace, etc.,
25 Broadway, New York, N.Y.

J. C. Stratton, c/o T. W. A., Hangar #2,
Washington National Airport, Wash., D. C.

Elihu Schott, c/o Cleary, Friendly & Cox, 52
Wall St., New York, N.Y.

Mrs. A. M. Archibald, c/o Pan American Airways, Inc.,
815 15th St., N. W., Wash., D. C.

J. Howard Hamstra, c/o Pan American Airways, Inc.,
135 E. 42nd St., New York, N.Y.

John W. Cross, 1625 K St., N. W., Washington,
D. C., (Cummings, Stanley, Truitt & Cross)

Philip Schleit, 1625 K St., N. W., Washington,
D. C.

Seth W. Richardson, Bowen Bldg., 815 15th
St., N. W., Wash., D. C.

Robert G. Thach, 1518 K St., N. W., Washington,
D. C.

C. Edward Leasure, 1518 K St., N. W.,
Wash., D. C.

James K. Crimmins, Chadbourne, Wallace, etc.,
25 Broadway, New York, N.Y.

Oppenheimer, Hodgson, Brown, Donnelly &
Baar, First Nat'l Bank Bldg., St. Paul,
Minn.

Hugh W. Darling, 737 Pacific Mutual Bldg.,
Los Angeles, Calif.

James Francis Reilly, 726 Jackson Place.,
Wash., D. C.

Sheldon Cooper, Cooper, White & Cooper, 701
Crocker Bldg., San Francisco, Calif.

Ronald C. Kinsey, Western Air Lines, Inc., 206
Shoreham Bldg., Wash., D. C.

John T. Lorch, Mayer, Meyer, etc., 231 S.
LaSalle St., Chicago, Ill. [1256]

Paul M. Godehn, Mayer, Meyer, etc., 231 La-
Salle St., Chicago, Ill.

Research Dept., c/o United Air Lines, Inc.,
5959 S. Cicero Ave., Chicago, Ill.

T. C. Drinkwater, Pres., Western Air Lines,
Inc., Carlton Hotel, Wash., D. C.

S. B. Redmond, Continental Air Lines, Inc.,
550 Equitable Bldg., Denver, Colo.

John H. Pratt, 905 American Security Bldg.,
Washington, D. C.

Joseph S. Iseman, Chadbourne Wallace, etc.,
25 Broadway, N. Y.

Fred O. Munch, 3145 W. 63rd St., Chicago, Ill.

James L. Crawford, 1015 Vine St., Cincinnati,
Ohio.

Hartman Barber, Rm. 301, 10 Independence
Ave., S. W., Wash., D. C.

Glen B. Eastburn, 1151 S. Broadway, Los An-
geles 15, Calif.

John M. Costello, 1411 Penna. Ave, Wash.,
D. C.

Special Messenger:

Burgess—POD

Delany—POD

Bulletin Board

Docket Section

Stough

Examiner: Wrenn B-101

Public Counsel: Highsaw B-38 Kennedy B-38

Charles A. Ballou B-47 [1257]

United States of America, Civil Aeronautics Board
[Title of Cause.]

BRIEF IN BEHALF OF THE BROTHER-
HOOD OF RAILWAY AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EX-
PRESS AND STATION EMPLOYEES

* * *

Conclusion

In conclusion we submit that no reasonable distinction can be drawn between the language of the respective sections contained in the Civil Aeronautics Act and the Interstate Commerce Act as the latter read prior to its 1940 Amendments and at the time of the United States Supreme Court's decision thereon; or between the authority conferred upon the Civil Aeronautics Board and Interstate Commerce Commission.

The phrases "public interest" and "public convenience and necessity" are indistinguishable in meaning. Both contemplate [1491] that the making of administrative decisions shall be guided by consideration of public interest and welfare. The decisions of the United States Supreme Court establishes that employee's protection is a phase of the public interest and welfare which may be appropriately considered in consolidations, mergers, or acquisitions of control, purchases, etc. The Civil Aeronautics Board, therefore, has complete jurisdiction and authority to protect the employees' interest involved in this proceeding, since it appears

that there is a possibility of adverse effect upon employees herein involved. We submit that the Board should exercise its statutory authority by imposing the conditions for their protection, as herein submitted.

Respectfully submitted,

/s/ JAMES L. CRAWFORD,

Attorney for Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. [1492]

United States of America, Civil Aeronautics Board

Docket No. 2839

WESTERN-UNITED, ACQUISITION OF AIR
CARRIER PROPERTY

OPINION AND ORDER

1. In passing upon the application of an air carrier for approval of a proposed acquisition of the property and business of another air carrier, the Board is not called upon to fix and determine the price that shall be paid, but to determine whether the agreed price is of such an amount and character as to affect adversely the interests of the buyer, the seller, or the public. (pp. 26, 27.)

2. While it would be exceeding the bounds of realism to deny that as between a buyer and a seller of air carrier properties, the purchase price may

include intangibles representing an appraisement of future earning power, the Board will not permit such intangibles to enter the investment of the purchasing carrier for rate-making purposes or otherwise to burden that carrier's rates with charges for the recoupment of the cost of such intangibles. (p. 29.)

3. Where the record shows that the price agreed upon by the air carrier parties to an acquisition was reached in negotiations conducted at arm's length by men of experience, ability, and knowledge of the air transport business and free from any suggestion of collusive or fraudulent purpose, and that the price is not unreasonable when judged by the standards of the commercial market; that that part of the price representing intangible value is not disproportionately large; and that its payment will not impair the operating efficiency of the purchasing carrier, or weaken its financial position or future earning power, no basis exists for a finding that the purchase price will be adverse to the public interest. (pp. 30-37.)

4. The market valuation of an air carrier property and business which is being transferred from a seller to a purchaser is essentially an appraisal of prospects for successful operation in the future, and it does not follow that the future earning power of such a property is controlled by the original cost of the individual items of which the property is composed. (p. 37.) [1739]

5. An acquisition of part of an air carrier's

property and business is held not to affect adversely the public interest where the following conditions are fulfilled: (1) that the investment value for rate-making purposes of the properties acquired by the purchasing carrier will not be augmented by reason of the transfer, and (2) that the entire excess of the purchase price over the investment value for rate-making purposes of the properties transferred, as measured by the original cost less allowable depreciation, shall be charged to surplus upon the books of the purchasing carrier at the time of the transfer. (p. 38.)

6. The view that notwithstanding any protective conditions that may be imposed by the Board to prevent the intangible elements in the purchase price from finding their way into the carrier's rates, thereby burdening the public users of the service, appears to rest upon assumptions that are at war with realities. (pp. 40, 41.)

7. To assume that under the established method of rate-making, the rates which the Board fixes will, by reason of the mathematical accuracy of the estimates upon which the rates must rest, invariably result in a mathematically reasonable rate of return at all times on each carrier's investment, or that the exact rate of return necessary to attract capital can be precisely determined for the industry and for each individual air carrier is to assume a degree of precision in the rate-making process which is unattainable in the world of reality. (p. 42.)

8. Due to the inevitable differences between air

carriers—differences in their size and strength, the integrational advantages under which they operate, the amount of competition to which they are subjected, and the differences which exist between the ability and efficiency of their respective managements—the uniform rates which prevail in a competitive industry such as air transportation do not and should not yield the same rate of return to all carriers subject to them. (p. 42.)

9. If a purchasing carrier, relying upon its managerial ability and the integrational advantages which it will enjoy from the operation of the property and business which it is purchasing, believes that it will be able to reap a better than average return under the fair and reasonable rates fixed by the Board, such carrier should be allowed to pay a reasonable sum for that opportunity when the public interest will not be adversely affected by such action. (p. 44.)

10. The regulatory policy to which the Board and other public utility regulatory bodies of the national and state governments have adhered and which recognizes reasonable market value with its ever-present intangible elements as the basis for exchange transactions, but which refuses to allow such intangibles to be reflected in rates, cannot adversely affect the public users of the service. (p. 46.) [1740]

11. If successful air carrier properties are not recognized by the Board as having a reasonable market value for acquisition purposes which is

somewhat in excess of the investment value of the properties for rate-making purposes, the owner of such properties will have no incentive to transfer them to another air carrier who would be in a position to operate them with greater advantage to the public interest; and the effect of such a policy would be to "freeze" the air pattern of the nation to its present design and thereby frustrate needed improvements in that pattern. (p. 47.)

12. The effect of price upon the public interest in transactions involving the transfer of air carrier property must be determined by the facts of the particular case and no inflexible rule outlawing intangibles from such exchange prices can act as a substitute for sound judgment based upon analysis of the evidence of record in the case being decided. (p. 49.)

13. As in the past, the Board will continue to scrutinize with care the prices agreed upon by parties to the transfers of air carrier properties to make sure that such prices are not unreasonable by the standards of sound commercial value, that they will not have a detrimental effect upon the air carriers involved and will not otherwise adversely affect the public interest. (p. 49.)

Decided: August 25, 1947.

Appearances:

HUGH W. DARLING,

For Western Air Lines, Inc.

J. FRANCIS REILLY,

For United Air Lines, Inc.

HOWARD C. WESTWOOD,

For American Airlines, Inc.

SHELDON G. COOPER,

C. EDWARD LEASURE, and

S. B. REDMOND,

For Continental Air Lines, Inc.

PHILIP G. SCHLEIT,

For Mid-Continent Airlines, Inc.

S. W. RICHARDSON, and

C. EDWARD LEASURE,

For Northwest Airlines, Inc.

J. HOWARD HAMSTRA,

For Pan American Airways, Inc.

GEORGE A. SPATER, and

JOSEPH A. ISEMAN,

For Transcontinental and Western Air, Inc.

JOHN H. PRATT,

For Minneapolis-St. Paul Airport Commission.

FRED O. MUNCH,

For Air Line Pilots Association.

GLENN A. EASTBURN,

For Los Angeles Chamber of Commerce.

JAMES L. HIGHS AW, JR., and

WILLIAM F. KENNEDY,

Public Counsel. [1741]

Opinion

By the Board:

This proceeding involves an application of Western Air Lines, Inc. (Western), and United Air Lines, Inc. (United), filed under sections 401, 408, and 412 of the Civil Aeronautics Act, requesting (1) approval of an agreement between Western and United, dated March 6, 1947, providing for (a) transfer by Western to United of the certificate of public convenience and necessity held by Western for route No. 68, and (b) sale by Western to United of certain aircraft, engines, spare parts, material and supplies, leaseholds, and other properties; (2) if the transfer of route No. 68 is approved, that the certificate when reissued to United contain a restriction prohibiting United from carrying local traffic between Las Vegas, Nev., and Los Angeles, Calif.; and (3) consolidation of route No. 68 with United's route No. 1, if the transfer of the certificate is approved.

American Airlines, Inc.; Continental Air Lines, Inc.; Mid-Continent Airlines, Inc.; Northwest Airlines, Inc.; Pan American Airways, Inc.; Transcontinental and Western Air, Inc.; Air Line Pilots Association, Minneapolis-St. Paul Airports Commission, and Los Angeles Chamber of Commerce were granted permission to intervene. After notice to all interested parties and the public, a hearing was held before Examiner Thomas L. Wrenn. Pursuant to motions of Western and United the Board by order dated June 6, 1947, directed the Examiner

to certify the record to the Board for initial decision and permitted all parties to file briefs with the Board and present oral argument.

Western holds certificates of public convenience and necessity for routes Nos. 13, 19, 52, 63, 68, and for a route between Los Angeles and Mexico City, D. F., via San Diego and La Paz. Its subsidiary, Inland Air Lines, Inc., holds certificates for routes Nos. 28 and 35. A description [1742] of Western's system is set forth in a footnote.¹ United's route No. 1 traverses the continent between the western terminals of Seattle, Oakland-San Francisco, and Los Angeles, and the eastern terminal points of Washington, New York-Newark, and Boston, via various intermediate points, including Chicago and

¹Western's route No. 13 between the terminal point, San Diego, Calif.; the intermediate points El Centro, Calif.; Yuma, Ariz.; Palm Springs, San Bernardino, Long Beach, and Los Angeles, Calif.; Las Vegas, Nev.; St. George, Cedar City, and Richfield, Utah, and the terminal point Salt Lake City, Utah. Route No. 19 between the terminal point Salt Lake City; the intermediate points Ogden and Logan, Utah; Pocatello and Idaho Falls, Idaho; Jackson, Wyo.; West Yellowstone, Butte, and Helena, Montana, and the terminal point Great Falls, Montana; Route No. 52 between Great Falls and Edmonton, Alberta, Canada, via Cut-Bank-Shelby, Mont.; Lethbridge and Calgary, Alberta, Canada; Route No. 63, between Los Angeles and San Francisco, extended May 19, 1947, to Portland, Ore., and Seattle, Wash.; Route No. 68, between Los Angeles and Denver, Colo., via Las Vegas, Nev., and Grand Junction, Colo.

Inland's route No. 28, between Cheyenne, Wyo., and Great Falls, Mont., via Casper and Sheridan, Wyo., and Billings and Lewiston, Mont. Inland's

Denver, and also extends north and south along the Pacific coast between Seattle and San Diego via San Francisco and Los Angeles and other intermediate points. It also operates routes Nos. 17 and 57, and a route between San Francisco and Honolulu, T. H. The Board's decision of May 19, 1947, consolidating routes Nos. 1 and 11, permits a nonstop operation between Los Angeles and Chicago and points east thereof on route No. 1.² [1743]

The principal provisions of the agreement of March 6, 1947, for which approval is requested, follow:

(1) Western agrees to transfer to United its certificate of public convenience and necessity for route No. 68 (Denver-Los Angeles), and sell certain property used and useful in connection with the operation of the route, an itemized inventory of which was attached as Exhibit A.

(2) United shall pay Western in cash as consideration for the agreement the sum of \$3,750,000.

(3) United agreed to loan Western, within two days after execution of the agreement, the sum of

route No. 35, between Minneapolis-St. Paul, Minn., via Rochester and Mankato, Minn.; Brookings, Huron, Pierre, Spearfish, Rapid City, S. Dak., and (a) beyond Rapid City, via Hot Springs, Chadron, Alliance, and Scottsbluff, Nebr.; Cheyenne, Wyo., and the terminal point Denver, Colo., and (b) beyond Rapid City, the terminal point Sheridan, Wyo.

²Transcontinental and Western Air, et al., Route Consolidations, Docket No. 2142, decided May 19, 1947.

\$1,000,000 in cash, evidenced by a promissory note due on or before September 1, 1947, secured by a chattel mortgage. If the agreement is approved by the Board on or before September 1, 1947, the loan will be credited to the total consideration to be paid Western. If the agreement be disapproved by the Board prior to September 1, 1947, the loan is to bear interest at the rate of 3 per cent per annum from the date of the Board's order.

(4) The parties shall request the Board to amend the certificate for route No. 68 simultaneously with the approval of the transfer to United to include a restriction prohibiting the transportation by United of passengers, property, and mail between Los Angeles and Las Vegas.

(5) If approved by the Board the consideration going from United to Western and the transfer of certificate and other property shall take place on the 21st day following the issuance of the order.

(6) In the event the Board disapproves the agreement, the parties will be relieved of all obligations thereunder except that Western shall be obligated to United on account of the promissory note and chattel mortgage according to the terms thereof. [1744]

Approval of the agreement is requested under sections 401, 408, and 412 of the Civil Aeronautics Act. Section 401(i) provides that no certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest. Section 401(h) provides that the Board may,

upon petition or upon its own initiative, after notice and hearing, amend any certificate if required by the public convenience and necessity. Section 408(a)(2) provides that it shall be unlawful, unless approved by order of the Board, for any air carrier to purchase the properties or any substantial part of the properties of any air carrier. Section 408(b) provides for approval unless the transaction "will not be consistent with the public interest." Section 412(a) provides for the filing of agreements by air carriers while paragraph (b) of the section provides that such contract or agreements shall be disapproved if found adverse to the public interest or in violation of the Act. The difference in language of these sections has little practical effect as public interest is the primary consideration under each section, and the test of public interest is the same under each section.

Western was issued a certificate for route No. 68 November 11, 1944, in a proceeding in which it, United, TWA, and Continental were applicants.³ On appeal by United the Board's decision was upheld by the United States Court of Appeals for the District of Columbia.⁴ Western began operations over the route on April 1, 1946, with DC-4 equipment. For the nine months ending December 31, 1946, it realized a profit on route No. 68 of approxi-

³Western A. L., Denver-Los Angeles Service, 6 C.A.B. 199.

⁴United Air Lines v. Civil Aeronautics Board, 155 Fed. 2nd, 169 (decided April 22, 1946).

mately \$640,000, the only route on which a profit was earned during the year. [1745] For the twelve-month period April 1, 1946, through March 31, 1947, traffic over the route totaled 93,812 passengers, of which 25,125, or 27 per cent, were exchanged with United at Denver and traveled to or from Chicago and points east thereof. Total passenger revenue derived from Route No. 68 in 1946 was \$2,670,000.

Western's president testified at length as to the reasons why Western determined to transfer the route No. 68 certificate. He stated that after he assumed the office on January 1, 1947, he was concerned with the company's financial position and its future; that an analysis convinced him that Western's dual role as a regional carrier and as a participant in transcontinental transportation was one of the primary causes of the company's difficulties. He concluded that the Denver gateway with its change of planes had proved less attractive to the public than single-carrier service to the west coast and that, with intensification of competition and route consolidations then pending by TWA and American, the service would become still less attractive.

Western's president stated that route No. 68 is the only segment over which it needs to operate DC-4 or DC-6 aircraft because of the terrain, but that utilization of this aircraft over such a short segment is uneconomical. Yet he felt that without DC-6 aircraft it will be impossible for Western to compete for transcontinental traffic to and from Los Angeles with American using DC-6 and TWA using

Constellation equipment. He was of the opinion that the local traffic between Denver and Los Angeles is not sufficient to justify Western's purchase of DC-6 aircraft. The witness reasoned therefore that, in order to derive the ultimate full benefit of route No. 68 as a proper segment of a trans-continental route, Western should be extended to Chicago. This, he believed, would involve additional capital requirements [1746] of approximately \$35,000,000. The witness further concluded that if Western should get to Chicago it was inevitable that United would be extended to Los Angeles and, therefore, Western would be a poor fourth in a competition with American, TWA, and United, between Chicago and Los Angeles. Therefore, in order to make this program fully effective, it would be necessary for Western to attempt to get to New York or some other eastern terminal, which would necessitate an additional \$50,000,000 in capital.

Western's balance sheet as of February 28, 1947, showed current assets of \$3,820,000 and current liabilities of \$10,095,000, with more than \$1,000,000 of the current assets in the form of inventories of parts and supplies. Western's president testified that he was advised by underwriters and bankers in the latter part of January, 1947, that a financing program of Western, which had been negotiated in the latter part of 1946, could not be activated because of depressed conditions of the market and the general public reaction against airline securities. The company had major obligations of several million dollars coming due on February 10, which, if

not extended or met, could have resulted in receivership or bankruptcy for Western. Confronted with this situation the witness testified that he made an appraisal of the company's future policy and goal. He concluded that continued operation of the system as it exists would necessitate additional capital requirements of \$15,228,000 in order to meet financial obligations incurred and to procure DC-6 equipment which the company felt would be necessary if it continued operation of route No. 68. On the other hand, he concluded that if Western disposed of route No. 68 and confined its operations to a north-south route west of the Rocky Mountains, additional capital requirements would be reduced to \$7,260,000. Much of the reduction results from elimination of DC-6 equipment on order. [1747]

Western's president stated that after considering these prospects, he reached the decision that Western should not attempt to continue to participate in the transcontinental market, but should retire from route No. 68 and concentrate on a regional service in an area west of the Rocky Mountains, based primarily on a route from Edmonton, Canada, to Los Angeles, via Great Falls, Salt Lake City, Las Vegas, and from Seattle to Mexico City via Portland, San Francisco, Oakland, Los Angeles, San Diego, and La Paz. Western believed it could operate this route structure with Convair 240 aircraft and could eliminate 4-engine equipment, thus permitting it to conduct all of its operations with one type aircraft with greater economy.

The witness stated that he felt the time had come

to make some route adjustments in the country's air transportation map by reason of the technological development in aircraft which affect existing route structures. He concluded that United Air Lines, the only transcontinental carrier connecting with route No. 68 in Denver, was the logical carrier to take over operation of route No. 68. In the latter part of February, 1947, Western's president called the president of United, discussed the matter with him, and arrangements were made for a meeting in California on February 28. Discussions continued for several days, resulting in the agreement for which approval is sought.

Upon the signing of the agreement, \$1,000,000 of the purchase price was advanced to Western as a loan evidenced by a promissory note, secured by a chattel mortgage on four DC-4 aircraft, three of which were units other than those which are to be transferred to United under the terms of the agreement. [1748]

Neither the Delaware law, under which Western is incorporated, nor the company's by-laws requires shareholders' approval. The transfer was authorized by a meeting of the board of directors on March 5, attended by four of the directors, while the fifth was called at his home in Salt Lake City and expressed informal approval. The directors are: Mr. Wm. A. Coulter, owning 228,810 shares of stock; Mr. Leo Dwerlkotte, owning 15,112 shares; Mr. Stanley Guthrie, owning 625 shares; Mr. T. C. Drinkwater, owning no shares, and Mr. George A. Smith for the Mormon Church, owning 898 shares;

the total owned or represented by the directors amounts to 46.9 per cent of the authorized and outstanding shares.

It is asserted by the applicants that the transfer of route No. 68 is in the public interest for the following reasons: (1) That route No. 68, being a segment of the Great Circle transcontinental route, is properly a segment of United's transcontinental route No. 1; (2) that it is in the public interest that appropriate route adjustments be effected voluntarily by carriers subject to Board approval and that such voluntary cooperative efforts should be encouraged; (3) that route No. 68 will not support separate services, one local and one transcontinental; that operated as a local route it will not support economical services with four-engine equipment; that the local traffic is not sufficient to support a separate service; therefore, United can but Western cannot operate the route at a profit; (4) that the financial benefits accruing to Western are in the public interest; (5) that the transfer of route No. 68 to United will not create a monopoly or restrain competition, and that no other carrier will be harmed by the transfer.

It is also contended by the applicants that the transaction will make possible additional and improved air services to the public. The cities served by United which will be given new one-carrier service to Los Angeles [1749] and other points on route No. 68 are: Omaha, Des Moines, Moline, Cedar Rapids, Iowa City, Lincoln, Grand Island, and North Platte. These cities had a 1940 popula-

tion of 1,320,474 persons within a 25-mile traffic generating area, and all are key cities of important trade areas. The record shows that on the west coast the predominant community of interest of cities in the States of Illinois, Iowa, and Nebraska is with Los Angeles. In September, 1946, all of the cities on the Denver-Chicago segment of United's route No. 1, which would receive new one-carrier service to Los Angeles under the proposal here involved, had more traffic to and from Los Angeles than with San Francisco despite the fact that they had direct one-company service to that city and did not have such service to Los Angeles. The predominance in Los Angeles travel over that with San Francisco ranges from 2.6 times in the case of Des Moines to 1.5 in the case of Lincoln. In September, 1946, the cities between Denver and Chicago generated 1,295 passengers to and from Los Angeles and a total of 1,425 passengers to and from Southern California. United estimated that for the year 1948 a total of 15,287 passengers will travel over route No. 68 between the cities intermediate to Denver and Chicago and Southern California points. In September, 1946, there were 3,246 passengers who traveled between Los Angeles and Denver, 603 between Grand Junction and Denver, 236 between Grand Junction and Los Angeles, and 149 between Las Vegas and Denver. United estimated that under its operation 104,000 passengers would move over route No. 68 in 1948. Denver will be given new one-company service to Southern Cali-

fornia points and will be placed upon the Los Angeles transcontinental air freight route, giving the cities the benefits of augmented air [1750] freight service both in frequency and improved equipment. It is also contended that United will provide the latest four-engine pressurized equipment over the route and that elimination of the arbitrary junction point at Denver offers definite benefits in flexibility of service under adverse weather conditions.

The intervener, Minneapolis-St. Paul Metropolitan Airports Commission, takes the position that the Board has found that the public convenience and necessity require single air carrier service between the Twin Cities and Southern California; that the agreement presented for the Board's approval wipes out at one stroke this single-carrier service and is in derogation of the public interest, and if the public interest is to be protected, approval of the agreement should be so conditioned that the same or equivalent service will be provided. On December 19, 1946, Inland, a subsidiary of Western, was extended from Huron, S. D., to the Twin Cities, providing a direct one-carrier service between the Twin Cities and the Denver-Los Angeles area.⁵

In September, 1946, there was a total of 1,065 passengers between the Twin Cities and Los Angeles. On April 1, 1947, Western inaugurated operations into the Twin Cities. Traffic data for the month of April submitted for the record show a total of 320

⁵North Central Case, Docket No. 415, et al., decided Dec. 19, 1946.

passengers from Twin Cities to Denver and beyond, 303 passengers from the Twin Cities to points east of Denver, 41 passengers from Rochester to Denver and beyond, or a total of 664 west-bound passengers. The record does not contain the east-bound [1751] traffic out of Los Angeles, but Western's traffic manager estimated it would be the same as the west-bound, or a total of more than 1,300. The record also shows that during April, 1947, Northwest and Mid-Continent together carried 495 passengers out of the Twin Cities destined to Los Angeles. Combining this figure with Western's traffic of 320 to Denver and beyond, shows a minimum of 815 passengers using air travel one way, or a gain of 34 per cent over September, 1946.

The intervener points out that there was rain on 26 out of the 30 days in April, that Western did little advertising of its new route since it had already decided to discontinue service by selling route No. 68, that Western's downtown ticket office is on the 14th floor of an office building, and that neither of the two schedules operated out of Twin Cities is a single-plane service, in spite of which the actual load factor over the route was 70 per cent. The intervener argues that these traffic data reflect a steadily growing community of interest between the Twin Cities and Los Angeles, which requires a single-carrier service. The intervener contends that if the Board desires to approve the sale of route No. 68 and still protect the public interest, it can and should condition approval so that the same or equivalent service will be provided. It suggests two

methods whereby this might be done: (1) to require United to purchase route No. 35 and operate the Los Angeles-Twin Cities route as a whole; (2) to require single-plane dual carrier service through a satisfactory equipment interchange at Denver. It is the position of the intervener that the first alternative appears ideal. [1752] In this connection, the president of United stated that United would be willing to purchase route No. 35 at a price "set by the Board." When questioned regarding an interchange arrangement at Denver, United's president suggested the possibility of a route-leasing arrangement between United and Mid-Continent at Omaha, and testified that prior to the instant transaction the chairman of the board of directors of Mid-Continent had discussed the possibility with him and that both were interested in the matter.

One of the provisions of the agreement is that the parties shall request the Board upon approval of the transfer of certificate that it be amended by including a restriction prohibiting United from transporting passengers, property, and mail between Los Angeles and Las Vegas. Las Vegas is now and has always been an intermediate point on Western's route No. 13, which route embraces 3 segments, San Diego to Los Angeles, Los Angeles to Las Vegas, and Las Vegas to Salt Lake City. The September, 1946, survey indicates that the local Los Angeles-Las Vegas traffic accounts for approximately 25 per cent of the revenue passenger miles generated by route No. 13. Western contends that the local traffic between Las Vegas and Los Angeles is a source of

strength to route No. 13 which should not be diluted by United carrying traffic over the route. United takes the position that the Los Angeles-Las Vegas traffic was originally Western route 13 traffic and should be reserved to that route as it is short-haul, high-density traffic of the sort which Western as a regional carrier will be equipped to carry. United expressed its [1753] willingness to accept a restriction of this nature in the Denver-Los Angeles case, and it should be noted that TWA is restricted from engaging in local transportation between Las Vegas and Los Angeles. The only local transportation between these points is furnished by Western on its routes Nos. 13 and 68.

United requested that, if the Board approve the transfer of route No. 68, it should be consolidated with route No. 1. If route No. 68 and route No. 1 are consolidated, United, among other things, will be able to operate nonstop services between Omaha and Los Angeles and provide a one-stop service between Minneapolis-St. Paul and Los Angeles, via Omaha, through connections with Mid-Continent at that city. It was also pointed out that such a consolidation would eliminate the present operating disadvantages at Denver under adverse weather conditions and would permit flexibility of United's operations and improve the long-distance service on route No. 1. The record does not indicate that any of the intervening carriers will be adversely affected by the consolidation and no carrier advanced such a contention at the hearing. [1754]

Conclusion

Approval of the transfer of a certificate of public convenience and necessity under section 401(i) requires an affirmative finding that the proposed transfer will be consistent with the public interest. Adjudication of this issue is a balancing process with no single factor controlling the determination. The Board has said that "The public interest has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best uses of transportation facilities."⁶

In considering acquisitions of control and transfers of routes, the Board has ever borne in mind the fact that the air map of the country can be changed as drastically by such transactions as by obtaining certificates of public convenience and necessity and, where such transactions might result in destroying a balanced route system, approval of the proposal has been withheld. An early application of this principle is found in a previous agreement between these same carriers wherein the Board refused approval of the proposed acquisition of Western by United.⁷ This transaction, as all such proposals, must be examined to determine whether it will facilitate an economically sound and efficient operation and at the same time satisfy the standard

⁶Acquisition of Marquette by TWA, Sup. Op., 2 C.A.B. 409.

⁷Acquisition of Western A. E. by United A. L., 1 C.A.A. 739.

of public convenience and necessity. To serve this purpose it is necessary that the route to be transferred should bear an integrated relation to United's system and be adapted to its normal flow of air traffic.⁸ There can be no question but that route 68 will bear an integrated relation to and will fit geographically into United's system. The Denver-Los Angeles segment is a segment of the Great [1755] Circle transcontinental route between Los Angeles and New York. The Board recognized this fact when the route was certificated.⁹ In that decision the Board recognized that the interest of a large portion of the traveling public on the Denver-Los Angeles route would best be served if it were operated by United as a transcontinental carrier. However, the Board found that this consideration was outweighed by the destructive effect which the award of this route to United would have upon Western.

Since Western is the only carrier operating over route No. 68, the transfer to United will not remove any competition over the route. With United now having non-stop right between Chicago and Los Angeles, approval of the agreement will not result in creating a monopoly or restraining competition, thereby jeopardizing other air carriers not a party to the transaction, nor does the record indicate that

⁸National-Caribbean Atlantic Control Case, 6 C.A.B. 671.

⁹Western A. L., Denver-Los Angeles Service, *supra*.

any other carrier will be adversely affected by loss of revenues so as to impair its ability to render present service.

It is urged by Public Counsel that the proposed transaction should be disapproved on the ground that controlling considerations of public policy make it undesirable. It is argued that the applicants have undertaken to remake the aviation map and have arrogated to themselves a function of the Board; that approval of this transaction will result in similar actions. It is urged in view of the circumstances under which Western acquired route No. 68, that Western now seeks to profit by what it now claims was a mistake on its part and on the part of the Board. It is the position of Public Counsel that Western ought to apply to the Board for the transfer of the route to such applicant as the Board might designate and that United ought to be required to prove in a proceeding where other carriers have equal chance to present a case that the public [1757] interest requires that it have the Denver-Los Angeles route, and that if the latter be true, there is no reason why United should have to pay for such a route. Three reasons are advanced why the proposed sale should not be approved: (1) It would tend to establish as a criterion for selection of a carrier, not fitness and ability to conduct the service, but willingness and ability to outbid competitors for it; (2) it would encourage the peddling of certificates; (3) it would compel the acquiring carrier, United, to expend its funds to

obtain a service which by hypothesis it is in the public interest for it to operate.

Undoubtedly, the question of whether United should be forced to pay for a service which it is in the public interest for it to operate is a matter of concern in resolving this question. However, it is appropriate first to determine whether the proposed transaction in and of itself, aside from such elements as price, is in the public interest or whether it is so inherently bad on its face as to be plainly contrary to the public interest. If the latter be true, then there is no necessity for considering the matter further. On the other hand, it is possible for a situation to exist wherein a transfer of a route if made at a reasonable price is consistent with the public interest as illustrated by the Marquette case. In determining whether the proposal is in the public interest it is necessary to review the facts in Western's certification for the route.

In the Western-United Merger case, the decision was reached to preserve Western as a carrier having good promise of rendering independently an efficient service in the western part of the country. At that time Western was both a north-south operator and a link in a transcontinental service via Salt Lake City. The Board has never lost sight of this objective, for in the Denver-Los Angeles service case in which [1757] Western, United, TWA, and Continental were applicants the Board awarded Western the route. In that case the Board found that the interest of a large portion of the traveling public would best be served if the route were oper-

ated by United as a transcontinental carrier; however, the Board felt it necessary to subordinate this interest to protecting Western at the time. It was clear that the Denver-Los Angeles service was a substitution of Denver for Salt Lake City as a connecting point for Los Angeles traffic to and from the east, and that award of the route to any carrier other than Western would result in serious diversion of Western's revenue. The record at that time showed that half of the traffic on Western's Los Angeles-Salt Lake City route was destined to or originated at Denver or points east. At that time route 13 was Western's strongest route, and on the basis of the record in that proceeding the Board concluded that the award of the route to United or any other carrier would divert so much traffic from Western as to seriously impair its ability to continue as a strong independent carrier in position to compete for traffic in the western section of the country. The Board pointed out that transcontinental travelers going via Denver may suffer inconveniences because of connections, but that inconvenience is outweighed by the public advantage of preserving Western as a strong regional carrier. It seems quite clear that the Board did not feel that it could take from Western its strongest route at that time and hope for that carrier to continue to operate an efficient service. [1758]

The Board did not at the time of that decision have before it for decision Western's application for extension into Portland, Seattle, Mexico City, and other points, and Western had not inaugurated

its Los Angeles-San Francisco operation. The Board has recognized in several opinions that it is inevitable in an industry as dynamic and changing as air transportation that certain adjustments have to be made from time to time. As implied in one of the Member's concurring opinion in the Denver-Los Angeles decision, the award of the route to Western did not forever close the door to United subsequently being given a similar award, but that continued technical development of transport aircraft might make it economically desirable to conduct non-stop operations between the Mississippi Valley and the Pacific coast.

That technical development is now here. The advent of larger aircraft has offered the advantages of greater speed and range. To take full advantage of the technological developments of air transportation the Board in recent months has been called upon to make numerous adjustments in route patterns. The routes of three of the transcontinental carriers, American, TWA, and United, have been consolidated to permit the operation of non-stop services between major metropolitan cities of the east and west coast, all of which permit improvement in service benefiting a substantial volume of passengers. One day before the hearing began in this proceeding the Board issued its order consolidating certain routes of TWA, American, and United, the effect of which was to permit each of these carriers to operate non-stop services between Chicago and the west coast. United was permitted to make its first direct entry into Los Angeles on

route No. 1 by means of non-stop service between Los Angeles and Chicago or points east [1759] thereof.

The foregoing developments since the Board's decision in the Denver-Los Angeles case have resulted in substantial changes in the relationship of route No. 68 to the remainder of the Western system. Although the only route upon which Western realized a profit in 1946 route No. 68 can no longer be expected to be Western's predominant route. Traffic originating at points east of Chicago for Los Angeles and interchanged with United at Denver can no longer be expected to utilize the Western service in view of the availability of United's, American's and TWA's through service from Chicago to Los Angeles. Thus, of 66,000,000 revenue passenger miles developed during the 12 months ended March 31, 1947, over route No. 68, approximately 21,000,000 revenue passenger miles represent passengers interchanged with United at Denver for points east of Chicago. Western estimates that the loss of the through business would have changed a profit of \$650,000 for the period April 1 to December 31, 1946, to a loss of about \$360,000.

In addition to the reduced importance of the Denver-Los Angeles segment as a source of traffic, important developments in other parts of the Western system have materially contributed to the changed relationship. Western's route No. 63 between Los Angeles and San Francisco, which was not in operation at the time of the Board's decision in the Denver-Los Angeles route case, has developed

a substantial volume of business for Western as evidenced by the 24,146 passengers carried between these points by Western in September, 1946. Of peculiar significance is the growth of traffic on route No. 13 between Los Angeles and Salt Lake City. It was over this segment that connecting transcontinental traffic moved prior to inauguration of the Denver route and it was the potential loss of this traffic [1760] which the Board considered as controlling in its awarding the Denver-Los Angeles route to Western. Yet, traffic data show that the revenue passenger miles on route No. 13 increased from 2,685,966 in September, 1943, to 4,852,000 in September, 1946.

Other routes for which Western has been certificated but on which service has not yet been inaugurated or fully developed include the Los Angeles-Mexico City route and the San Francisco-Portland-Seattle route. Both of these routes are potentially strong in traffic and should further enhance Western's position as a western regional carrier. Western's recent development of its regional traffic, and future traffic that may be anticipated on the routes certificated since the opinion in the Denver-Los Angeles case, clearly indicate that its participation in the transcontinental interchange traffic does not and will not in the future play the predominant role it did at the time it was awarded the Denver-Los Angeles route.¹⁰ Thus, it is clear that the impelling reason which led the Board in

¹⁰Transcontinental & Western Air, Inc., Consolidation of Routes, *supra*.

1944 to select Western as the operator of the Denver-Los Angeles route no longer exists.

There is also evidence in the record indicating that because of the mountainous terrain of route No. 68 it could best be operated with 4-engine equipment. Western plans to operate its other routes with standard new twin-engine equipment, but says if it continues to operate route No. 68 it would have to maintain 4-engine equipment for this route and forego many of the economies that it can effect by standardization of its equipment. [1761] Confronted with this problem, Western concluded it should not continue to operate route No. 68 but should restrict its operations to those of a regional carrier serving that region of the United States which lies west of the Rocky Mountains. According to Western, continued operation of route No. 68 and the Inland system would force it to retain transcontinental aspirations that might in the end become quite costly. Such managerial judgment on the part of Western does not seem contrary to the public interest.

On the other hand, United could profitably maintain service over the route No. 68 with the type of equipment it now operates providing not only non-stop service from major eastern points but also the needed local service from Denver to Lower California. Operation by United would, in addition, enable that carrier to provide a single-carrier service between Los Angeles on the one hand and points between Denver and Chicago¹¹ on the other which

¹¹Omaha, Des Moines, Moline, Cedar Rapids, Iowa City, Lincoln, Grand Island, and North Platte.

would be required to make connections at Denver if the route were retained by Western. During September, 1946, a total of 1,425 passengers utilized the existing connecting service to Lower California and in view of past experience an increase in traffic volume may be expected with the substitution of a direct single-carrier service.

As hereinbefore pointed out, the Minneapolis-St. Paul Airport Commission contends that if the Board approves the sale of route No. 68, the service between the Twin Cities and Southern California should not be impaired. In determining whether the proposed sale is in the public interest we must, of course, weigh all pertinent factors and consider any detriment which might result from the transaction. It is recognized that approval of the [1762] Western-United agreement will eliminate one-carrier service between the Twin Cities and Los Angeles. However, when considering this factor in connection with the many benefits to be derived from the proposed sale, we do not believe this is so serious as to outweigh the advantage and require disapproval of the transaction. The evidence submitted by the Twin Cities shows that there is a steadily growing community of interest between the Twin Cities and Los Angeles. While Western has provided these communities with one-carrier service, it has not supplied single-plane service, nor could it conduct nonstop operations between the Twin Cities and Los Angeles under existing route authorizations because of a required stop at Denver, a route junction point. United has expressed a

willingness to accommodate the Twin Cities-Los Angeles traffic, and points out that the approval of this transaction will create a two-carrier, two-plane service in place of a one-carrier, two-plane connecting service. United asserts, however, that in addition to convenient connecting schedules, it will also be able to provide additional schedules at Denver which will permit business or pleasure lay-over time at that city to persons traveling to and from Los Angeles and the Twin Cities and other points on route No. 35. The Twin Cities will also have the benefit of additional services to Los Angeles through the Omaha gateway, from which point United plans to conduct nonstop flights to Los Angeles.

In addition, there are three possibilities for the equivalent of one-carrier and probably one-plane service between Twin Cities and Los Angeles: United could and it has indicated a willingness to buy route No. 35; it could make appropriate arrangements with Inland which would [1763] provide a single-carrier service between the Twin Cities, Denver, and Los Angeles; or it could enter into a route-leasing or interchange agreement with Mid-Continent which would provide one-plane service via Omaha. It would thus appear that approval of the transfer of route No. 68 to United will not impair the quality of the existing service between the Twin Cities and Los Angeles, but might even result in an improvement of such service. In any event, United will be expected to initiate some arrangement for the provision of adequate service

between the Twin Cities and Denver and Los Angeles.

The intervener, Air Line Pilots Association, urges that the Board require as a condition of approval of the sale of route No. 68 that the pilots on the Denver-Los Angeles division should be taken over by United and given full employment and seniority rights without prejudices. It is not clear from the testimony that the local organizations of Western and United pilots subscribe to this policy. Western's president testified that Western had every intention of retaining the 14 flight crews operating on route No. 68 in the event this transaction is approved and transferring them subject to their seniority. This witness testified that Western would need more than the 14 crews available from the sale of route No. 68 in order to operate the Seattle extension and the Mexico City route. The witness also testified that no employee of Western will be released because of this transaction and that every competent employee in the employment of the company at Grand Junction and Denver will continue with Western, that the company will probably need more employees at Portland and Seattle than it presently employs at Denver and Grand Junction, and that Western will pay the employees' moving expenses. [1764] The evidence shows that the question of transfer of pilot personnel was not discussed in the negotiation preceding this transaction, nor was it a condition of the sale. It is clear from the record that Western's pilots will continue to be employed by Western, retaining their seniority and

other rights, and that every other competent employee on route No. 68, who would be retained by the company if this transaction had not been proposed, will continue to be employed by the company with full rights. Therefore, since there is nothing that would indicate that any of the rights of Western's present employees on route No. 68 will be prejudiced by the acquisition and operation of that route by United, there appears to be no reason for any condition of the nature urged by the Air Line Pilots Association.

In view of the foregoing considerations and all the facts of record, we find that the operation of route No. 68 by United is consistent with the public interest.

The Purchase Price

A principal issue in the present case is concerned with the price to be paid by United Air Lines for the property and business being purchased. The question arises whether this acquisition should be disapproved as contrary to the public interest unless the parties agree to reduce the price by an amount necessary to reflect the investment of Western in the property and business which are being transferred. The implications of such a question are of such importance to the air transportation system of the nation as to require the careful consideration of this Board. [1765]

The consideration to be paid by United has been fixed by the contracting parties at \$3,750,000. The tangible properties to be transferred, according to the record, were acquired by Western at an original

cost of \$2,022,400. Depreciation accruals through charges to operating expense as of March 31, 1947, have been accumulated against these properties in the amount of \$331,212, leaving an investment, after allowance for accrued depreciation, of \$1,691,188. It thus appears that the purchase price exceeds the original cost of the tangible properties by about \$1,700,000 and is greater than the cost less depreciation of such properties, as carried on Western's books, by approximately \$2,000,000.

Although it appears probable from the record that the purchase price was negotiated by the parties on a "lump-sale" basis rather than by totaling the individual prices for the various items composing the properties and business to be transferred, evidence was presented to indicate that an amount of approximately \$2,250,000 was considered to represent the fair market value of the tangible properties, leaving \$1,500,000 as the estimated payment for the intangible values covered by the agreement. In the allocation of the total purchase price as between tangibles and intangibles, the tangible properties were revalued at a price which exceeded the cost of these properties to Western less accrued depreciation by about \$500,000. The reasonableness of the price allocations to various individual items in the inventory of properties may be questioned as lacking convincing evidential support in the record. It does not appear to us, however, that any useful purpose will be served by detailed examination of these individual allocations. From the point of view of the burden to the public the total excess of the

price to be paid by [1766] United over the cost of these properties to Western, less allowable depreciation, must be considered as an upward revaluation of the investment, the inclusion of which for rate-making purposes would tend to support higher charges to the public for services performed over Route 68.

The source of greatest injury to the public interest from the transfer between air carriers of properties already dedicated to the public service necessarily stems from the tendency to revalue upward the properties so transferred for purposes of determining the investment upon which a return must be provided in the rate which the public must pay for services performed by these properties. We are therefore of the opinion that for rate-making purposes the proper valuation of these properties should be related to the original cost to Western less allowable depreciation rather than to the fair market value of such tangible property. On this basis the purchase price exceeds the valuation of these properties for rate-making purposes by approximately \$2,000,000 rather than the \$1,500,000 claimed by the parties to the agreement and accepted by Public Counsel.

The effect upon the public interest of the purchase price to be paid by United is one of the principal factors which the Board must consider in determining whether this transaction should be approved. It is important to keep in mind that the Board is not called upon in this proceeding to determine the price that shall be paid, but to deter-

mine whether the price which has been agreed upon by the parties is of such an amount and character as to render the Board's approval of the purchase adverse to the public interest. A purchase which is otherwise acceptable must, in the absence of overriding considerations, be adjudged contrary to the public interest if the consideration is so unreasonable as to adversely [1767] affect the interests of the buyer, the seller or the public. The question thus presented, therefore, is whether the contract price of \$3,750,000 is so related to the value of the properties being conveyed by Western to United that the Board can be satisfied that the interests of the traveling and shipping public and of the investors in air carrier operations will not be adversely affected.

At the outset it must be observed that for the purposes of this proceeding the value to be considered is the exchange value of the properties to be transferred, and not their value for rate-making purposes, the issuance of securities, corporate reorganization, taxation, condemnation or other public purposes. "Value," wrote Mr. Justice Brandeis, "is a word of many meanings."¹² The elements of valuation which may be considered by courts and regulatory agencies in one type of proceeding are not necessarily the same as those which may be considered in another. Thus goodwill, franchise value, and going concern value based upon a

¹²Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276, 310 (1923). (Opinion of Brandeis and Holmes, J.J.)

capitalization of past deficits have been excluded from the rate base in determining whether a public utility rate was confiscatory,¹³ but where a community acquires a public service corporation by purchase or condemnation, compensation must be made under some circumstances for its going concern value and its franchise.¹⁴ Similarly, in determining the [1768] value of a railroad for the purpose of reorganization proceedings under Section 77 of the Bankruptcy Act, the corporation's prospective earning power is the primary criterion of value.¹⁵ The Supreme Court of the United States has long recognized the distinction between value used in the exchange of property and value for rate-making purposes,¹⁶ and it has stated in an oft-quoted opin-

¹³*Willcox v. Consolidated Gas Co.*, 212 U. S. 19 (1909); *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655 (1912); *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153 (1915); *Galveston Electric Co. v. Galveston*, 258 U. S. 388 (1922).

¹⁴*Omaha v. Omaha Water Co.*, 218 U. S. 180 (1910); *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893).

¹⁵*Group of Investors v. Milwaukee R. Co.*, 318 U. S. 515 (1943). In another case involving valuation for the purpose of a railroad reorganization, Mr. Justice Reed, speaking for the Court, observed: "There is no more important element in the valuation of commercial properties than earnings." *Ecker v. Western Pacific Railroad Corp.*, 318 U. S. 448, 483 (1943).

¹⁶E.g., *Omaha v. Omaha Water Co.*, note 14, *supra*, at p. 203.

ion that "in determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property."¹⁷

We recognize that in exchange transactions for the transfer between air carriers of properties already dedicated to the public service such as the one which is the subject of the present proceeding, the prices which are paid respond to numerous incentives, many of which are collusive or improperly speculative in character. The inclusion in the investment base for rate-making purposes of intangible values stemming from such transactions must be vigorously challenged. It is obvious that if such intangibles were admitted to the rate base and the rates adjusted upward to provide a return on the [1769] investment thus inflated above original cost, the spiral of speculative values would have no limit other than the ability of the public and government to pay a return on the investment thus inflated.

But since commercial values in a free economy are, in large part, a capitalization of future earning power, and since the estimate of future earning power reflects the continuously changing appraisal of the risks of the industry by the suppliers of capital, the existence of intangible market values cannot be denied without exceeding the

¹⁷*Galveston Electric Co. v. Galveston*, 258 U. S. 388, 396 (1922). See also: *Southwestern Bele Telephone Co. v. Public Service Commission*, note 12, *supra*, at p. 311.

bounds of realism. The willingness of an able buyer to pay a price is the expression of a strong conviction, and when such convictions are held by experienced and capable people they cannot be disproved simply by establishing that such prices do include elements of intangible value.

It is of utmost importance that this Board not give impetus to speculative bidding by permitting the speculative elements of exchange values to be underwritten through inclusion directly or indirectly in the investment rate base. The public interest requires that it be made unmistakably clear to all stockholders and to all prospective future investors in the air transport industry that the intangible values which may be purchased in the acquisition of air carrier properties already dedicated to the public service will never be recognized by this Board as a part of the carrier's investment for rate-making purposes. This Board will not permit the rates charged to the public to be increased to provide a return on such intangibles or to otherwise burden such rates with charges for the recoupment of the cost of such [1770] intangibles.

In determining the investment value of the subject properties in the instant agreement for rate-making purposes, therefore, we will provide that these properties shall not be augmented in value beyond their reasonable investment value for rate-making purposes by reason of their transfer from Western to United and that the amount in excess

of the original cost to Western, less allowable depreciation, shall be charged against surplus.

In appraising the reasonableness of the purchase price as related to the public interest in the transaction now before us, one guide to judgment is the fair commercial price as established by the arm's length bargaining of the parties. In our consideration of this question we must either accept the normal market standards for arriving at prices in business transactions, after taking adequate precaution against the abuse of these standards by reason of fraud, duress, or collusion, or we must accept the responsibility of fixing the price on the basis of our own standards. The latter course we consider to be not only contrary to the intent of the Act, but outside the competence of the Board.

Evidence of the reasonableness of the price in the present proposed transaction is the fact, which clearly appears of record, that the parties negotiated at arm's length.¹⁸ The negotiations were free from any suggestion of collusive or fraudulent purpose. The seller agreed to a price which it believed to be a fair consideration for the property and business which it had developed on this route and was now selling. The purchaser likewise believed that the price was fair to it. Both parties were represented by their presidents, men of business experience and ability and knowledge of air transport business. In the absence of contradictory evidence, we [1771] cannot lightly consider the

¹⁸Cf: National-Caribbean Atlantic Control Case, 6 C.A.B. 671 (1946).

undisputed fact that the price was reached after negotiations conducted at arm's length, by men who sought to safeguard the interests of their respective companies and were competent to do so.

It is apparent that the parties cannot have relied upon past precedents of the Board for support of the intangible values through revaluation of the properties for rate-making purposes. For those precedents make clear the Board's policy to exclude any consideration of such values in prescribing fair and reasonable rates.¹⁹ Counsel for United Airlines clearly stated on the record that United did not expect the amount of \$1,500,000 which it identified as the intangible value in the purchase price to be incorporated in its rate base and would not ask that the rates bear any part of the cost of such intangibles. The record discloses no evidence to support a conclusion that the price agreed upon was influenced by any factor other than the fair commercial value of the properties in question.

That the price in the present transaction is not unreasonable by the standards of the commercial market is further corroborated by the reflection of substantial intangibles in the general market prices of air carrier stocks. The stocks of the larger domestic air carriers, including both parties to the

¹⁹Acquisition of Marquette by T.W.A.—Supplemental Opinion, 2 C.A.B. 409 (1940); Wien Alaska Air—Acquisition—Mirow Air Service, 3 C.A.B. 207 (1941); Western A. L., Acquisition of Inland A. L., 4 C.A.B. 654 (1944).

subject agreement, have for an extended period consistently sold well above their book values. During the early postwar period the market values ran from three to seven times the book values for corresponding periods. As of June 30, 1946, the per cent of market [1772] price in excess of book value for the stock of United, Western and for the average of the eleven largest domestic carriers was 50%, 71% and 70% respectively. The corresponding figures as of March 31, 1947, soon after the date of the subject agreement, were 31% for United, 35% for Western, and 55% for the average of the eleven largest carriers.

It is thus apparant that if United were to sell stock in the market with which to finance the acquisition of the properties in question it could expect to receive cash substantially in excess of the average book value of its outstanding stock. Although the stock prices which reflect the current values of air carrier properties in general do not necessarily reflect the reasonable market price for any particular air carrier property, they do, nevertheless, serve to lend credence to the reasonableness, in terms of market standards, of the price paid for the properties here under consideration.

Although a clearly extreme price paid for an intangible may in itself be reason for disapproval of an agreement, the facts in this case do not indicate that the price to be paid is disproportionately large. The price assignable to these intangible values attributable to the earning power represents approximately 40 per cent of the total purchase

price. We note that the Interstate Commerce Commission has approved acquisitions in which the value of the intangibles exceeded by as much [1773] as four or five times the value of the physical properties transferred,²⁰ and in which the financial soundness of the transferee and the potential earning power of the properties transferred were less

²⁰Keeshin Transcontinental Freight Lines, Inc.—Control—Seaboard, 5 M.C.C. 25 (1937) (Approved on condition that purchase price be reduced from \$250,000 to \$200,000, thus recognizing intangibles to have a value more than twice as great as the value of the tangibles; purchaser's capital surplus was \$600,000); Airline Motor Coaches, Inc.—Purchase—Mahan, 5 M.C.C. 331 (1937) (Approved purchase price of \$50,000 where tangibles represented only \$8,000, or less than 1/5 the value of the intangibles; purchaser had earned surplus of \$80,657); Brown Express—Purchase—Metzer, 5 M.C.C. 681 (1938) (Intangibles were valued at \$40,000, or four times the value of the tangibles; purchaser has earned surplus of \$24,672); Public Service Interstate Transp. Co.—Purchase—Healy, 5 M.C.C. 735, 15 M.C.C. 481 (1938) (Approved purchase price of \$450,000 where intangible values amounted to \$337,475, or three times the value of the tangibles; purchaser had a surplus deficit of \$1,456,740); Cincinnati, N. & C. Ry. Co.—Control—Black Diamond Stages, 15 M.C.C. 644 (1939) (Intangible values of \$132,039 were three times the value of the tangibles.)

Compare the following cases in which the Commission disapproved acquisitions on the ground of the unreasonableness of the purchase price; Union Bus Lines, Inc.—Purchase—Amberson, 5 M.C.C. 201 (1937) (Good will and operating rights were valued at thirteen times the value of the tangible property, and indebtedness was to be incurred to

clearly established than in the present case.²¹ [1774]

While Western and United made reference to certificate value as a possible justification for that part of the purchase price which is assignable to the \$1,500,000 of intangibles, the record fails to show that such value played any significant part in the negotiations. Western stated that actually the certificate itself bore no part of the purchase price but that "in the exercise of sound business judgment and consistent with ordinary business practice they relied on the profit-making prospects

meet the purchase price); Gray Line Motor Tours, Inc.—Control—Royal Blue, 15 M.C.C. 326 (1938) (Price of \$100,000 was to be paid for a corporation having physical property valued at \$15,858 and a debit balance in its surplus account).

Indeed, the Commission has approved purchases of bare operating rights unaccompanied by any physical properties; Brooks Transp. Co., Inc.,—Purchase—Jacobs Transfer Co., 5 M.C.C. 85 (1937) (\$15,000); Bowen Motor Coaches—Purchase—Morton, 5 M.C.C. 385 (1938) (\$50,000); Interstate Busses Corp. (Conn.)—Purchase—United Transp., 15 M.C.C. 285 (1938) (\$15,000); Capitol Greyhound Lines—Purchase—Peninsula Transit, 15 M.C.C. 459 (1938) (\$40,000); Lee Way M. Freight, Inc.—Purchase—Superior M. Freight Lines, Inc., 15 M.C.C. 745 (1939) (\$15,000).

²¹For example, in Intermountain Transp. Co.—Purchase—Meisinger Stages, 5 M.C.C. 493 (1938), the Interstate Commerce Commission approved an acquisition of a motor carrier at a price of \$30,000, of which sum \$15,810 represented operating rights; the purchaser had a surplus deficit and the vendor had a consistent record of deficits in annual earnings.

of the business venture with which they were dealing to support any amount paid over and above the reasonable value of flight equipment." (Brief, p. 40).

It seems clear from the record that what United was purchasing was the earning power of Route 68 which United believed would be much more productive if operated by itself than if operated by Western. Although the certificate which provides its holder with protection against uneconomic competition is associated with earning power, earning power must not be confused with certificate value. If Route 68 had no earning power and could be operated only at a loss, the certificate would not have added a dollar to the purchase price. Even if any part of the price in the present transaction had been considered by the negotiating parties to represent certificate value, that value would not enter into the rates of the purchasing carrier. For this Board in accordance with its established policy refuses to allow a certificate granted by the public to be capitalized against the public. [1775]

Financial Competence of Buyer

It is pertinent to consider the effect of the present transaction upon the financial competence of the purchaser. This question breaks down into two issues: (1) Does the current financial position of United permit it to finance the purchase price to be paid for the properties in question; and (2) will the transaction undermine the credit of United in

the future so as to impair its ability to perform its common carrier services?

The financial condition of United as of March 31, 1947, compares favorably with other carriers of comparable size in the industry. Its balance sheet reflects current assets of \$24,265,000, current liabilities of \$13,122,000, and quick assets, consisting of cash and marketable securities, of \$13,070,000, and a total capital and earned surplus of \$15,452,000. The total purchase price involved in this transaction is less than 25% of United's surplus and less than 30% of its quick assets. United's total net worth, as of March 31, 1947, was approximately 63% of its over-all capitalization. There has already been advanced to Western the amount of \$1,000,000 which would apply on the purchase price leaving \$2,750,000 remaining to be paid. Under these circumstances there can be little doubt as to the carrier's financial ability to meet the purchase price without jeopardy to its financial position or impairment of its operating efficiency.

The question as to the possible effect of this transaction upon the future credit position of United is inseparable from an appraisal of the reasonable commercial value of the properties to be acquired, and is, of course, a matter of judgment and forecast rather than of fact. The [1776] tangible assets of United are not dissipated simply because they are paid in part for intangible market values, but only if they are expended in such manner as not to protect the carrier's future earning power. The effect of this transaction upon the

credit position of the carrier in the future will, therefore, depend upon the manner in which its earning power is affected and not upon any theoretical relation of the cost of the tangible properties to the price paid.

Of course, it is not possible to determine with absolute certainty now what will be the possible future effect of this transaction upon United's credit in the years to come since that is a matter of future development. Neither would it be possible to evaluate with exactness the future effect of the expenditure of large sums for publicity and advertising or in fact the much larger sums which are now being expended for new and larger aircraft. The future must be gauged in terms of reasonable probabilities. It can be predicted with confidence, however, that all of these expenditures will enhance or detract from the carrier's credit in exactly the same proportion in which they enhance or detract from the carrier's future earning power. The decisions underlying such transactions are basically the responsibility of management, subject only to regulatory action where managerial discretion has been abused.

If the earning power record of Route 68 for the first nine months of its operation by Western, as presented in the record, can be relied upon as a basis for future forecast, United's credit position could scarcely be affected by acquisition of this route. According to evidence in the record the route realized a profit of \$640,000 during the first nine months it was operated by Western, or an

annual profit rate of [1777] approximately \$850,000.²² An annual profit of this amount would provide a return before taxes of 10% on an average investment of \$8,500,000, or more than 20% on the \$3,750,000 purchase price to be paid by United. If it be assumed that the route may be operated with greater advantage to the public by United than by Western, an assumption which is entirely consistent with our finding that the transfer of the route to United is in the public interest, there is little reason to conclude that United's future earning power will be adversely affected by acquisition of this route.

The market valuation is essentially an appraisal of the prospects for successful operation in the future and it does not follow that the future earning power of any operating property is controlled by the original cost of the individual items of which such property is composed. Both the buyer and the seller bargain for the most advantageous price obtainable. Agreements which are concluded are based upon the informed judgment of experienced managements. The prices are paid with full knowledge that they involve risks of a character common to the activities of all types of business. But it is not the province of this Board to nullify the judgment of management in the absence of

²²It is recognized that the subsequent grant to United, TWA and American of nonstop privileges between Chicago and Los Angeles may well diminish the earning power of this route if operated by Western.

evidence that the managerial discretion has been abused. The necessary safeguards to protect the public interest from abuses which, in the past, have arisen from sale transactions in public utility properties will be provided in the conditions which we shall attach to our approval of the present agreement. [1778]

Conditions to Approval

We find that the public interest will not be adversely affected by approval of the subject agreement at the agreed price and upon the following appropriate conditions:

1. That the investment value for rate-making purposes of the properties acquired by United not be augmented by reason of their transfer from Western to United.

2. That the entire excess of the price to be paid by United over the investment value for rate-making purposes of these properties to Western as measured by the original investment cost to Western less allowable depreciation be charged to surplus immediately upon consummation of the transaction rather than booked as an asset.

In establishing the first condition to our approval, we recognize that while United expressed a willingness to exclude from its rate base the million and a half dollars allocated by it to intangibles, that carrier did not express a willingness to exclude from its rate base the additional half million dollars represented by the excess in value allocated to the tangible properties over their book value. It is

nevertheless our opinion that the statutory responsibility of this Board, to impose such conditions to its approval of agreements for the transfer of air carrier properties as will adequately protect the public interest, cannot be discharged by permitting the properties to be revalued [1779] upward to support, through an inflation of the investment rate base, potentially higher charges to the public solely by reason of the transfer. The fact that such upward revaluation of the rate base is dignified by the term "tangible" property would not lighten the burden to the public which would be required to pay the higher rates necessary to support the inflated investment.

Our second condition is based upon the conclusion that the excess of the price to be paid over the depreciated cost of the properties to Western represents payment by United for better than average earning power permissible under sound rate-making policies and is therefore an intangible value to United and its stockholders alone, and is without significance to the users of the services contemplated by the certificate. In order that the full effect of our decision may be enforced and all reasonable possibilities of abuse removed, we shall establish as a condition to the approval of the subject agreement the requirement that the entire amount of the excess of the price paid over the cost of such properties, less allowable depreciation on the books of Western, shall be charged to the surplus of United at the time the properties acquired are taken up on the books of United.

The exclusion of this excess from the accounts of United will prevent the dead hand of the past from having any appreciable effect or influence upon the future. The effect, as well as the intent, will be to assess the stockholders for the amount of the excess price over the investment value of the properties for rate-making purposes and leave the prospect for additional earnings from the expanded operation under fair and reasonable rates as the only asset accruing to the stockholders. [1780]

Such accounting treatment will provide the maximum restraint against perpetuation of any hope that the intangible values may ever be included in the investment for rate-making purposes and it will provide a desirable safeguard against the possible misinformation as to the inclusion of such items in the investment rate base which may be conveyed to the public by reason of their presence in the carrier's accounts and reports as prescribed by this Board. By eliminating the intangibles from the effect of the acquisition transaction on the earning power statistics of the carrier and of the industry, the future influence of the payment for the intangibles in the subject transaction can scarcely be materially different from the distribution of surplus as dividends.

It is urged that notwithstanding our imposition of the above condition to the approval of the present acquisition, the intangible value will nevertheless work its way into rates to burden the public users of the service. In view of the fact that regu-

latory action against allowing public utility rates to be governed by the prices on which transfers of public utility property and business have been consummated has long been the established policy of experienced and expert regulatory bodies such as the Federal Power Commission and the Interstate Commerce Commission,²³ the novel contention that a regulatory body will find itself helpless to prevent an intangible value in an exchange price from finding its way into the rates which the public must pay deserves critical examination. [1781]

The reasoning advanced in support of this doctrine of regulatory paralysis derives a certain plausibility when presented by illustrative hypotheses supported by theoretical assumptions. Applied to the present case this doctrine might be stated as follows:

If United Airlines is permitted to pay \$3,750,000 for the property and business of Route 68 on the condition that the \$1,500,000 intangible value contained in this price will not be allowed to enter into the prudent investment base in which the Board fixes the carrier's rates, the carrier's rate of return on its total investment, including the intangible value, would be reduced below the reasonable rate required to attract capital. The \$3,750,000 purchase price containing the \$1,500,000 of intangibles could not then be financed because the combined capitalization of the carrier, after exclusion of the intangible element, would not per-

²³See Appendix to this opinion.

mit a yield sufficient to attract the necessary capital. The Board under such circumstances would then be compelled, in order to insure the carrier's ability to attract capital, either to increase the carrier's rate of return or to admit the additional \$1,500,000 into the rate base. The inevitable result, the argument concludes, will be the burdening of the public users of the service with rates which will be in excess of a reasonable return.

Such plausibility as may at first appear in the above argument in support of the banishment of all profit from sale transactions depends upon certain assumptions essential to the conclusions reached. We are told that the cost of the intangibles in the purchase price, whatever the accounting treatment, will inevitably be borne by the public because of the inability of the Board to limit earnings to a fair return. Such a [1782] claim assumes that under the established method of rate-making, the rates which the Board fixes as fair and reasonable will, by reason of the mathematical accuracy of the Board's estimates, invariably result in a mathematically reasonable rate of return at all times on each carrier's investment. To assume that the many factors which combine to produce the profit of an air carrier can or should be so closely controlled as to produce a return on the carrier's investment which can be demonstrated with mathematical precision to be fair and reasonable at all times, or that the exact rate of return which will attract capital can be precisely determined for the industry and for each individual carrier, is to assume

a degree of precision in a rate-making process involving estimates of the future which is unattainable in the world of reality. It is a "delusive exactness" which underlies such an assumption.

The assumption ignores the practical fact that the uniform rates which prevail in a competitive industry such as air transportation do not and should not yield the same rate of return to all carriers that operate under them. This is due to the inevitable differences between air carriers—differences in their size and strength, the integrational advantages under which they may operate, the amount of competition to which they are subjected and the differences which will always exist between the ability and efficiency of the various air carrier managements. The rate of return allowed a public service company is not determined solely by the amount necessary to maintain existing capital and attract needed capital. It is well established that a highly efficient air carrier will be allowed to earn a higher rate of return [1783] than a less efficient carrier.²⁴

When United Airlines concludes that it is good business judgment to pay two million dollars in

²⁴Justice Brandeis pointed out in his notable dissent in the *Southwestern Bell Telephone Company Case* that while a constitutionally compensatory rate requires that the public utility be allowed to earn enough to attract capital, a fair and reasonable rate fixed by a regulatory body "may allow an efficiently managed utility much more." *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 291 (1923).

excess of the actual investment in the business and property of Route 68, it does so in the conviction that by reason of the advantages which it will enjoy in the operation of this route it will be able to realize from the operation a better than average return on the investment value of these properties under fair and reasonable rates. United also relies upon its belief in its ability to accomplish through efficient management economies of operation which will be reflected in increased earnings. This carrier is presumed to be familiar with the established policy of this Board which recognizes that differences in the return may accrue to different carriers operating under the same rates and which permits management to retain the profits of its economies as an incentive toward the accomplishment of decreased costs and increased revenues.²⁵ The incentive which the Board's rate policy holds out to air carriers to profit from economies which produce a better than average return upon [1784] investment itself invalidates the assumption that the rate-making process is an instrument of preci-

²⁵"* * * a uniform service mail rate provides added incentive for increased operating efficiency by making the rate of profit directly dependent upon each carrier's competitive performance as measured by the relation of its costs to the costs of other carriers rather than upon an allowable rate of return on the investment of each individual carrier." Eastern A.L., Mail Rates, 6 C.A.B. 551, 555 (1945). The Board recently applied this incentive principle to the determination of a mail rate for a local-feeder service: Pioneer A.L., Mail Rate, Docket No. 2002, decided July 2, 1947.

sion which produces a mathematically precise rate of return.

These are the actual facts which describe the operation of the rate-making process of the Civil Aeronautics Board. They should make clear beyond question the reasons that moved United to conclude that it would be able to recoup the cost of the intangibles in the present price without the necessity of an appeal to the Board for an increase in its rates. If the cost of these intangibles is recouped it will be recouped out of earnings which the carrier itself, by its own efforts, has created under fair and reasonable rates fixed by this Board. If this carrier, relying upon its managerial ability and the integrational benefits which it will enjoy from its operation of Route 68, believes that it will be able to reap a better than average return under fair and reasonable rates established by the Board, the carrier should be allowed to pay a reasonable sum for that opportunity when, as in the present instance, the public interest will not be adversely affected by such action.

The conclusion that the public is certain to bear the cost of the intangible element of the purchase price in increased rates regardless of the safeguards against such a result imposed by the Board also ignores the [1785] fact that United in the present instance is not purchasing a property and business which constitutes a rate-making unit on which no more than a specified rate of return will be allowed. In support of the claim as to the speculative nature of United's payment, much is made of

United's estimate that it will be able to recoup its payment of \$1,500,000 for the intangible from the earnings of Route 68 within one year's time, thus realizing a large return upon the total purchase price.

To condemn the present transaction solely on the ground that excess earnings may be realized on this particular route would be to assume that the operations on each route segment of an air carrier system can and should be regulated in such manner as to provide the same rate of return for each route. Such assumption, however, does not square with the realities since different routes produce different earnings and the Board does not and could not attempt to restrict the earnings of each route to an equal rate of return on the investment in that route. The Board undertakes to establish a reasonable rate of return for the overall system of an air carrier which constitutes the unit for rate-making purposes and is composed of a number of routes some of which are profitable and some of which are unprofitable. United Airlines, in appraising the value of Route 68, must be presumed to have done so in full knowledge that it was buying a route which would not be a unit for rate-making purposes and that the return from that route would not be limited to the same rate of return which would be prescribed for United's system. The carrier considered that Route 68 could be developed into a very lucrative segment of its system which would be worth the price agreed upon.

On several occasions this Board in cases similar to the instant proceeding has approved transfers between air carriers where the purchase price contained [1786] elements of intangible value. In each of those cases the Board made clear its policy to exclude the cost of such intangibles from the rates fixed by the Board. It is not contended that in any one of those cases the intangibles actually found their way into rates to burden the users of the service.²⁶ The regulatory policy to which this Board and other public utility regulatory bodies of the national and state governments have adhered and which recognizes reasonable market value with its ever-present intangible elements as the basis for exchange transactions, but which refuses to allow such intangibles to be reflected in rates, cannot adversely affect the public users of the service. There is no theory of logic or principle of economics that can include in a rate base an amount that has been excluded or that can collect from the public in increased rates a cost that has been excluded by

²⁶In the rate proceeding which followed TWA's acquisition of Marquette, the Board said in this connection: "Included in 'Investments in and Advances to Affiliates' is the amount of \$313,333 representing the purchase price of the stock of Marquette Airlines, Inc. In the absence of evidence that any part of the purchase price represents actual and legitimate developmental expense incurred by Marquette, that portion of the purchase price exceeding the investment in the tangible assets of Marquette will be disallowed for present purposes." *Transcontinental & W.A., Mail Rates*, 4 C.A.B. 139, 149 (1943).

the rate-making body. An economic theory which holds otherwise is at war with realities. The intangible elements of value in the purchase price, under such a policy as that to which this Board adheres, no more enter the rate base than does the excess of market over book value of the carrier's capital stock. The effectiveness of this method of protecting the public through disallowances from both investment and operating expense in a rate proceeding would appear to be so well established in public regulatory experience as not to be subject to serious question.

What would be the probable effect upon the future development and improvement of our system of air transportation which might be expected to follow the adoption of a regulatory policy which prohibited any intangible [1787] commercial value from being included in the purchase price in transactions of this kind? It is a fact of common experience in utility regulation, which has been recognized by the Interstate Commerce Commission, that the property and business of a successful utility have considerable value and will not be sold to another unless the purchaser pays more than the net depreciated value of the tangible assets.²⁷ If successful air carrier properties are not recognized by this Board as having a market value which is somewhat in excess of the investment value

²⁷Union Bus Lines, Inc.—Purchase—Amberson, 5 M.C.C. 201, 205 (1937); New England Greyhound Lines, Inc.—Purchase—New England, 15 M.C.C. 536, 541 (1938).

of the properties for rate-making purposes, the possessor of such properties will have no incentive to transfer such properties to another air carrier who would be in a position to operate them with greater advantage to the public interest. In view of the interest which this Board has shown in the improvement of the air pattern of the nation wherever such improvement is found necessary to the economic strengthening of an air carrier and the furtherance of the public convenience—an interest which is attested by several pending investigations looking toward possible improvements in the air pattern—it would be strange indeed if the Board were now to declare a policy of hostility to any commercial profit however reasonable in any exchange transactions when the certain result would be substantially to “freeze” the air pattern of the nation to its present design and thereby thwart one of the very purposes which the Board has expressed an intention to promote.

Nor can it be said that an alternative for avoiding such a frustration of efforts to improve the nation's air pattern would exist in the application by the Board of “pressures” upon those air carriers that refused to part [1788] with their property and business without the inducement of a profit where the Board found such transfer to be required by the public interest. One of the gravest mistakes this Board could make would be to assume that the end justifies the means and that the Board could properly do indirectly by the exertion of such compulsion what it was not permitted

by law to do directly. We know of no direct or indirect means available under the existing law by which an air carrier can be forced against its will to transfer its property, business and certificate to another air carrier. If such transfers are to be accomplished under the existing law it would seem that the inducement of reasonable market prices, except in rare instances, would be found necessary even though such prices contained sufficient commercial profit to the seller to generate a business incentive to sell. No declaration by this Board against the validity of fair commercial prices that contain an element of profit will be able to repeal the economic laws and business motives that influence exchange prices and impel business activity in a free economy.

We can find no justification for a decision which would outlaw the profit incentive from business transactions like that before us. One of the basic attributes of free enterprise is the right of a business corporation to purchase the property and business of another at a price which will permit a reasonable profit to the seller since otherwise there is no incentive to sell. Although an air carrier is a public service company and as such is subject to all necessary and reasonable regulation for the protection of the public, it does not follow that such a company must be shorn by regulatory action of a discretionary power commonly possessed by business management where the exercise of such power has [1789] not been abused.

The essence of the rule to which we adhere in the

present case is that in transactions involving the transfer of air carrier property the effect of price upon the public interest must be determined by the facts of the particular case. No inflexible rule outlawing intangibles from exchange price can act as a substitute for sound judgment based upon careful analysis of the evidence of record of the particular case. The Board in such cases cannot consistently and should not renounce its responsibility and duty to undertake such a judgment by proclaiming a doctrine which would be, in effect, a legal presumption that any exchange price in excess of the prudent investment in the tangible assets being sold is regardless of the facts and circumstances of the case, per se, adverse to the public interest.

The Board will, in the future as it has in the past, scrutinize with care the prices agreed upon in such transfers to be certain that they are not unreasonable in terms of sound commercial values, and that they will not have a detrimental effect upon the air carriers involved or in any other way adversely affect the public interest. Our established policy to exclude from rates any element of intangible value which may appear in the prices agreed upon in any such transactions and our determination to disapprove transactions involving excessive and unreasonable prices are certain to act as deterrents to the negotiation of such prices. [1790]

Acting therefore in accordance with the principles already outlined and upon the facts of the present record, we find that the price agreed upon as the

consideration in the proposed acquisition will not be adverse to the public interest since the approval of the proposed acquisition is conditioned upon the requirement that the purchasing carrier shall, upon the consummation of the present transaction, charge to its surplus that part of the purchase price which is in excess of the depreciated original cost of the tangible assets being sold and in view of our policy of excluding the cost of such excess from consideration in any manner whatsoever in future determinations in fixing the carriers' rates.

In view of all of the foregoing considerations we therefore find that the agreement dated March 6, 1947, between Western and United, and the transfer of route No. 68 from Western to United are consistent with the public interest and will not result in creating a monopoly and thereby restrain competition or jeopardize another air carrier not a party to the transaction. We further find that the public convenience and necessity require that upon its transfer to United route No. 68 be consolidated with route No. 1, and that United's certificate for route No. 1 be amended so as to prohibit United from engaging in local air transportation between Las Vegas, Nevada, and Los Angeles, California.

An appropriate order will be entered.

Ryan, Vice Chairman; Branch, Lee and Young, Members of the Board, concurred in the above opinion. Landis, Chairman, filed the attached dissenting opinion. [1791]

Appendix

Policy of the Federal Power Commission and Interstate Commerce Commission With Respect to Price in Acquisitions.

It has become customary for applicants before the Federal Power Commission to propose that any excess over the depreciated original cost be disposed of in the manner prescribed by the Commission's Uniform System of Accounts—by a charge to surplus or by amortization against income—and for the Commission to condition its approval of such transactions accordingly. See: Virginia Electric & Power Co., 4 F.P.C. 51 (1944), (Excess over original cost amounted to \$11,036,749); Union Electric Company of Missouri, 4 F.P.C. 655, 4 F.P.C. 724 (1944). (Purchase price of \$8,600,000 exceeded the estimated original cost of the property by \$892,493; order of approval required this excess to be charged immediately to earned surplus); Empire District Electric Company, et al., 4 F.P.C. 665 (1944), (Excess over original cost, amounting to \$6,793,211, charged to capital surplus); Pennsylvania Electric Company, Docket No. IT-5977, decided June 6, 1946 (Cash consideration of \$42,451,400 included an estimated amount of \$9,145,839 in excess of original cost to be transferred to accounts of purchaser and amortized over a period of 15 years); East Oregon Light and Power Company, et al., Docket No. IT-5974, decided June 28, 1946 (Base purchase price of \$2,326,000 included an amount of \$253,383, representing excess of acquisition cost over original

cost, which was required to be amortized); Southwestern Public Service Company, Docket No. IT-5994, decided August 13, 1946 (Base purchase price of \$2,135,000 included an amount of \$233,041 representing excess of purchase price over depreciated original cost, which was required to be [1792] amortized).

Compare the following cases, in which the transactions were approved subject to completion of cost studies and subsequent charge-off of any amounts by which the purchase price might be found to exceed depreciated original cost: Eastern Shore Public Service Company of Maryland, 4 F.P.C. 382 (1943); Wachusett Electric Company, et al., 4 F.P.C. 920 (1945); Worcester Suburban Electric Company, et al., 4 F.P.C. 929 (1945).

For cases upholding orders by which the Commission in proceedings subsequent to such acquisitions required public utilities to amortize the excess out of annual charges to income where the excess represented payment for intangibles such as good will, going value, nuisance value and franchise and monopoly value, "all of which were thought to be rooted in and associated with prospective earning power," see: *Pacific Power & Light Co. v. Federal Power Commission*, 141 F. (2d) 602 (C.C.A. 9th, 1944); *California-Oregon Power Co. v. Federal Power Commission*, 150 F. (2d) 25 (C.C.A. 9th, 1945), cert. den. 326 U.S. 781 (1946).

The Interstate Commerce Commission, in cases involving the acquisition of motor carriers, in 1939 inaugurated a policy of conditioning its approval

of such transactions upon the requirement that the purchasing carrier eliminate from its accounts the amount by which the purchase price exceeds the value of the physical properties acquired, either by amortization of the amount by charges to income over a specified period or by an immediate write-off where the purchasing carrier has sufficient surplus. See: Herrin Transp. Co.—Purchase—Malbrough, 25 M.C.C. 710 (1939), (Operating rights purchased for \$1,000 were required to be amortized or written off to surplus, at option of purchaser); Buckingham Transp. Co. of Colorado, Inc.—Purchase—Casey, 25 M.C.C. 667 (1939), (Operating rights purchased for \$15,000 were [1793] amortized over 10 years); Mason & Dixon Lines, Inc.—Purchase—Cox, 36 M.C.C. 475 (1941), (Excess of the purchase price of \$25,700 over the value of the physical properties, amounting to \$16,233, was charged immediately to surplus); Cox Transp. Co. — Purchase — Moore-Flesher Hauling Co., 36 M.C.C. 515 (1941), (Operating rights purchased for \$3,500 required to be amortized or written off immediately, at option of purchaser); Skeel—Purchase—Jess Kuhns & Grays Harbor Lines, Inc, 39 M.C.C. 810 (1943), 40 M.C.C. 318 (1945), (Original order, requiring that intangibles amounting to \$134,927 be written off immediately to capital accounts, modified to permit amortization over a 10-year period).

The same policy is followed by the Commission in approving acquisitions of water carriers and freight forwarders. Panama City Transit Co., Inc., Certificate Transfer, Finance Docket No. 15172, de-

cided March 14, 1946; Western Carloading Co., Acquisition by Western Carloading Co., Inc., Docket No. FF-79, decided September 11, [1794] 1941.

Dissenting Opinion

Landis, Chairman, Dissenting.

I regret my inability to concur with my colleagues in their approval of the transfer of Route 68 from Western to United for the price of \$3,750,000. I regret my enforced dissent particularly in view of the necessitous situation that presently confronts Western and the fact that the ready cash derivable from the sale of this route may be of great assistance to Western in acquiring financial stability. But the issues presented by this case far transcend in importance the immediate relief that Western may theoretically receive from the consummation of this transaction. They seem to me more significant than any issue that has been presented to the Board during my service with it. For the action of the majority of the Board makes impossible that much hoped for and much needed reordering of the air transportation map of the United States that can only be accomplished under our system of enterprise by voluntary consolidations, mergers, and route transfers. Equally unfortunate for the public interest, this action of the majority of the Board is certain in my judgment to be productive of serious and eventually disastrous inflation in values underlying air transportation that to date have in the main been kept

sound. We have seen the effects of inflation in other industries, in railroads, in public utilities, always with dire consequences to the investing and consuming public, and yet for some reason—the glibness of the accountant, the sophistry of the lawyer, or the alleged practicality of the [1795] business man—we seem still to refuse to learn that two and two make four and not six, unless of course the unseen public is made to contribute an unseen two.

1. The Theory of Public Utility Regulation.

Basic to the concept of public utility regulation is the theory that certain businesses of vital interest to the public, normally having some element of monopoly in them, are under obligation to render services to the public at reasonable rates. The services rendered are usually widespread and must necessarily be utilized by the public in the normal processes of living. This is true, for example, of telephone service, of gas and electricity, of railroad transportation and a host of other services. It was for this reason that Mr. Justice Brandeis in *The New England Divisions Case*, 261 U. S. 184, 196 (1923), spoke of railroad rates as being equivalent in their economic impact upon the public to taxes.¹ Paid initially by shippers, the cost is passed on to the wide consuming public so that an increase in rates economically speaking is little

¹Speaking for the Court in *The New England Divisions Case*, Mr. Justice Brandeis said at page 196: "What the Commission did was to raise the additional revenues needed by the New England Lines, in part, directly through increase of all rates

different from the imposition of a sales tax or some other form of impost or excise.

If this is so of the normal public utility, it is much more true in the case of a subsidized public utility. In such a case to the rate that initially has the economic effect of a tax, there [1796] is added the subsidy, which is plainly a tax going clearly to the whole of the public. The obligation to keep rates at reasonable levels is thus a more severe responsibility in the case of a subsidized industry, such as air transportation, than in the normal public utility.

For years controversy raged about the nature of a reasonable rate. That it had to cover legitimate operating costs was, of course, recognized. But it had to do more. It had to provide a reasonable return as well. In *Smyth v. Ames*, 169 U. S. 466 (1898), especially as interpreted during the inflationary years following World War I, the return was required to be on "value" and in the estimation of value reproduction cost was given prime effect.² In his concurring opinion in the

40 per cent, and in part, indirectly, through increasing their divisions on joint rates. In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax."

²The Supreme Court supported the basic principles of *Smyth v. Ames* in the following leading cases: *Newton v. Consolidated Gas Co.*, 258 U. S. 165 (1922); *Galveston Electric Co. v. Galveston*, 258 U. S. 388 (1922); *McCardle v. Indianapolis Water Co.*, 272 U. S. 400 (1926); *United Railways v. West*, 280 U. S. 234 (1930).

Southwestern Bell Telephone Case, 262 U. S. 276 (1923), Mr. Justice Brandeis exposed the fallacy of that approach, pointing out that the pursuit of that fair value theory simply enhanced costs to the public as against basing the return on original cost qualified by the concept of prudent investment. Highlighted by the inflation that the reproduction cost theory brought about in the public utility field with the consequent economic disaster that began in 1929 and accelerated in force for the next few years, and by the administrative impossibilities posited by this reproduction cost theory with a consequent strong demand for public [1797] ownership,³ Mr. Justice Brandeis' theory finally won out so that today the principles he expounded in

³The demand for public ownership was crystallized in the minority report of Commissioners Walsh, Bonbright and Adie which dissented, in part, from the Report of Commission on Revision of the Public Service Commissions Law, (New York), Legislative Document No. 75, (1930). At page 410 of the report, this minority group stated: "So clear is our conviction on this point that, if the necessity of submitting indefinitely to the "fair value" standard were to be assumed, we should be ready to recommend to your honorable body the immediate adoption of a policy looking toward governmental ownership of the utilities of New York State. Indeed, we are not at all sure that such a policy will not sooner or later become inevitable in view of the inherent difficulties of any system which attempts to combine public control with private ownership and operation."

the Southwestern Bell Telephone Case have come to be recognized as the law of the land.⁴

We must, therefore, start our thinking from certain plain premises. These are that the air transport industry has no valid claim as against the public to an opportunity to earn more than a fair return upon its investment, and, secondly, that in view of the subsidy presently given to the industry, there is a high obligation upon this Board to see that the return, inclusive of mail pay, is limited to a fair return.

It follows from these principles that values of any character attached to airline properties that are based upon the expectation of earning more than a fair return rest upon an expectation that has no foundation as a matter of legal right, but results solely from the [1798] inadequacies of the administrative process to carry out the mandate of the law. To say that such values are illegitimate would be wrong. They exist as the market demonstrates, but they exist only because of the inherent fallibilities of man and his government. It is hardly a legitimate aim of a regulatory body to sanctify these values, or worse, to write them in to

⁴See: *Los Angeles Gas and Elec. Corp. v. Railroad Commission*, 289 U. S. 287 (1933); *Railroad Commission v. Pacific Gas and Electric Co.*, 302 U. S. 388 (1938); *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575 (1942); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U. S. 635 (1945).

the very regulatory structure dedicated to their elimination. But that is the effect of the doctrine now being announced by the majority.

Regulating the rates charged by public utilities so that they shall be reasonable and not reflect an undue return on investment is not an easy matter. Even in the case of a single public utility the problem has its difficulties. Due to variations in demand a surplus from a rate for a particular accounting year may be quite justifiable for the same rate applied during the next year may well give less than a fair return. The problem becomes immensely more difficult when the utility to be regulated is not an isolated one but an industry where the component parts are not equally strong and yet rates must be substantially uniform. This problem from the beginning has baffled the Interstate Commerce Commission with the result that rate regulation in the railroad industry has little reference to investment.⁵ [1799]

For my part I am unwilling to admit that this failure in the field of railroad rate regulation is

⁵An attempt to maintain uniform rates and at the same time limit earnings to fair returns was made by the Recapture Clause of the Transportation Act of 1920. That met an untimely death, partly due to political pressures but mainly due to the fact that the Supreme Court, with Justices Brandeis, Stone and Holmes dissenting, made it hinge as an operative matter on the impossible regulatory doctrine of "value." *Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I.C.C. 3 (1927); *St. Louis & O'Fallon Ry. Co. v. United States*, 279 U. S 461 (1929). The possibilities of some similar treatment of the airline

conclusive evidence that we too must sacrifice the public interest to the pressures of the market. True, there can be no exactness in synchronizing a fair return with an investment base. The market speculates daily upon our inability to achieve this goal. But it is wrong for us to accept defeat now with regard to our regulatory trust and admit that our own inefficiencies to hold rates and subsidy to a fair return are a sound basis for the creation of "value." We have not yet exhausted the ingenuity of man working in behalf of his fellow man, however much the market may gamble upon our weaknesses and our failures. Out of the recognition and admission of failure, there can stem hope; out of the certain prognostication of it, only defeat and death.

problem is worthy of consideration. The air transport industry receives subsidy not only in the form of mail pay but in the form of a nationally maintained network of airways whose cost in annual upkeep far exceeds that of the cost of carriage of the mail. The air transport industry, like the railroads, has its weak and strong lines. To say to this industry that we will guarantee it a fair return on investment during its developmental period and an opportunity to earn a fair return thereafter, but that returns over and above that measure shall go to the maintenance of the industry as a whole, is neither an ungenerous nor an unwise national gesture. Such a policy will deprive no investor of a legal or a constitutional right. *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456 (1924). Indeed, it might well substitute stability for the unfortunate volatility that today affects the industry, as well as provide security in lieu of purposeless speculation.

2. Analysis of the Purchase Price

The purchase price for Route 68 and the accompanying properties is \$3,750,000. Physical properties transferred by Western to United amounts at most to a claim for \$2,250,000. These consist of four items: [1800]

(1) Four DC-4 aircraft at \$450,000 each, or \$1,800,000: A market value of \$450,000 each for these aircraft seems established on the record.⁶ Although the depreciated book value of these aircraft is less than \$450,000, I am content to allow this claim. Where assets are capable of being withdrawn from public use without impairing the ability of the carrier to continue to perform its public service, the carrier is presumably free to withdraw those assets from use in the public service and to

⁶The original cost of these aircraft is recorded as \$1,613,882.73, and their net book value as of March 31, 1947, was \$1,285,463.94. The record indicates that \$450,000 is approximately the market value for DC-4 aircraft. It appears that the last DC-4 aircraft sold by Douglas was priced at \$482,500. Western has recently sold two DC-4 type aircraft: one was sold to the Waterman Airlines for \$450,000 and another, without engines, to Australian National Airlines for \$380,000, the latter installing engines at an additional cost of \$72,000. It is stated that if United had sought to purchase used DC-4's the price would range from \$195,000 to \$350,000 (the latter figure being characteristic of the class of aircraft to be transferred by Western), with additional conversion costs amounting to \$163,500. An additional element of value to United is the immediate availability of Western's aircraft, since the minimum daily net income earned by a DC-4

secure for those assets whatever price the market affords. And if the purchaser is another carrier it may not be inappropriate for the second carrier to pay the market price even though the figure be in excess of the net investment cost of the equipment as shown on the books of the first carrier. The public will, of course, to the extent of the accumulated depreciation on the books of Western, have already paid for the difference between market value and depreciated cost. It should not be [1801] forced to pay this sum again. The difference between these two sums is a profit to Western, but the entire cost is an investment for United that can become a part of its rate base.⁷ Since Western

plane ranges from \$1,100 to \$2,500 and the average time required for conversion would be approximately 122 days. Thus, it is argued that the immediate availability of DC-4 aircraft would not only prevent interruption of service but would avoid a net revenue loss to United of \$134,200 to \$305,000 per airplane. While the evidence fails to show clearly that the aircraft here involved are wholly comparable to those cited in establishing a market value of \$450,000, it does appear that a fair showing as to the market value of the DC-4 aircraft has been made.

⁷It is not always possible in situations of this type to bring about such an easy recoupment of a public investment—in this case the difference between market and depreciated cost of the tangibles being transferred. In most of the public utility cases dealing with a problem of this nature, two factors are commonly present which are not present here. The first is that the property has not been and cannot be withdrawn from the public service

has been and is a "need" carrier receiving subsidy mail pay, the profit that belongs to the public can be and should be chargeable against Western's subsidy payment and as such, by relieving the public treasury, the public will be reimbursed what it already has paid. [1802]

(2) Four spare engines, hubs and blades at \$60,000: The original cost of the spare engines, hubs and blades was \$18,234.31, and their net book value as of March 31, 1947, was \$15,441.35. The agreed price at which these items are to be transferred is \$60,000, which is said to represent their replacement cost. The agreed price is thus approximately four times the net book value of the prop-

and hence there is in essence no market price. The second is that the seller is normally retiring from the public service and thus there is no method of recouping from the seller the profit that he makes in his liquidation of the accumulated depreciation. Resort is thus had to the device of requiring the excess of cost to the new buyer over depreciated cost to the seller to be carried to a property acquisition or adjustment account and amortized "below the line" as a charge on income rather than as an operating cost. This does not have the effect of recouping for the public what it already has paid in the form of depreciation. It does tend to restrain the payment of dividends in excess of normal, and call for their re-investment in the company, gradually pressing out the water that is there. Nevertheless, this device accomplishes this end only through the allowance of earnings normally in excess of what otherwise would be a fair return. But here, where a device exists for recouping for the public its investment in accumulated depreciation, it is best to utilize this device.

erty. No specific evidence was offered to support the figure of \$60,000. In the absence of such evidence, the applicant's claims with respect to these items should not be allowed.

(3) Spare parts at \$265,037: It is claimed that this price corresponds roughly with the market value of the parts. It appears that the items included on the list to be transferred to United are the high-cost items of Western's inventory rather than the low-cost items. Western testifies, however, that it has recently sold spare parts aggregating \$150,000 to \$200,000, and that these parts realized a profit of from 5 to 50 per cent over their original cost. There is further testimony that \$30,000 to

I would have no objection, however, to requiring United to carry this excess to a property acquisition account in accordance with the instructions governing account 1910 in the Uniform System of Accounts for Air Carriers. (C.A.B. Form 41 Manual (1947), 7-1). Its amortization thereafter, whether above or below the line, is of no material moment under the present circumstances since United is not now a "need" carrier and its rates are such as it chooses to establish. The excess could also be charged directly to surplus with the same results. The important thing is to deal with this excess as profit to Western and thus recoup for the public what the public already has paid. The treatment of this excess on the books of United is of less importance. If the price is actually a reasonable present cost to United, I see no objection to its inclusion in the rate base, though at the same time I might well urge rapid amortization of that excess in the interest of conservatism and because of some doubt as to the legitimacy of the alleged market values.

\$50,000 worth of items on the list of those to be transferred to United have actually been sold, Western having reserved the right to substitute other similar items, at prices representing a profit of approximately 30 per cent over cost. The record indicates that United will need only \$150,000 [1803] to \$200,000 worth of the spare parts which are being transferred but that it will be possible for that carrier to resell the parts at prices reflecting their cost to it. In the light of these facts, it can be found that the claimed price of \$265,037 is a reasonable consideration for the transfer of spare parts to United.

(4) Properties at Denver and Grand Junction at \$125,197: The record indicates that these items are priced at their costs to Western, that most of the items are new, and that their current market values equal their costs. There thus appears to be no reason to question the propriety of an allowance of \$125,197 for the properties located at Denver and Grand Junction which are to be conveyed to United.

The total purchase price that can reasonably be recognized as applicable to the physical properties transferred is thus \$2,205,675. There remains a balance of \$1,544,325.

Western argues that this balance can be absorbed by twelve designated intangible items. Ten of these can be easily disposed of as pure make-weights. They are:

(1) The assignment by Western to United

of a contract to purchase five DC-6 aircraft from the Douglas Company.

It is said that United would thereby receive earlier delivery and possibly also a lower purchase price than would be available were United to negotiate directly for the new aircraft. It is not clear that the assignment of the contract will be accomplished inasmuch as [1804] Western, United and Douglas have not yet agreed on terms. Moreover, there is no satisfactory evidence on which to base a claim predicated on the expeditious delivery of the DC-6 aircraft to United at a more favorable price than United could otherwise secure.

(2) The expense which Western will incur in revising all its permanent advertising and display materials to eliminate the Denver route.

The incidental expenses of revising advertising material do not constitute an item which will benefit United and for which United should make compensation. Other changes in Western's route system will require similar revisions in advertising and display materials; however, it will presumably not be argued that these items, commonly and appropriately charged to operating expense, have any proper place among Western's capital assets.

(3) The technical experience and data accumulated by Western in the operation of the route.

To the extent that Western's experience and data relative to route 68, not otherwise available, are given to United, the latter will benefit. Any expen-

ditures made by Western in accumulating technical experience and data are properly a part of Western's extension and development expenses for Route 68 and will be considered hereafter. Therefore, no separate allowance for this item can be made.

(4) The benefit that will accrue to United in its operation of this difficult route from Western's pioneering of the route and overcoming the public's objection to flying over the mountains directly west of Denver. [1805]

Any investment incurred by Western in the development of Route 68 will be hereafter considered in relation to extension and development costs.

(5) Certain leaseholds to which no specific dollar values are allocated.

There is evidence in the record that United will use space and facilities presently leased by Western at Denver and Grand Junction. Leaseholds may be recognized as a proper intangible element in the appraisal of property to be transferred only when appropriately supported by adequate evidence. There is no such evidence in the record. Therefore, no allowance can be made on this record for leaseholds.

(6) The considerable expense to which Western will be put in re-arranging and moving its personnel at Denver and Grand Junction to other points on Western's system, and the revision of bookkeeping and ticketing procedures and practices made necessary by the elimination of Route 68.

These expenses are in no way related to any asset value being conveyed by Western to United. Hence, no allowance for this alleged intangible is warranted.

(7) The loss that Western may incur in the sale of its DC-4 aircraft, which aircraft, it is alleged, Western would not have purchased had it not been for the projected operation of Route 68.

Even if it is assumed that Western would not have bought any DC-4's were it not for Route 68, there is no proper basis for imposing on United any costs arising from the fact that Western's venture with Route 68 is not deemed worthy of continuance by [1806] Western's present management. The expenses incurred in the operations of Route 68 and the losses, if any, which may have been sustained or which may hereafter be incurred, are part of the risks of enterprise. They are not elements of intangible value which can be recognized for any regulatory purpose. Hence, no allowance is made for this item.

(8) The cost of moving the personnel and the operational and maintenance facilities of Western's subsidiary, Inland, from Cheyenne to Denver.

These expenditures bear no such relation to Route 68 as to warrant their inclusion in the price to be paid by United.

(9) The costs of moving personnel from other parts of Western's system to aid in the

inauguration and operation of Route 68 and the cost of training their replacements.

These costs are presumably reflected in the extension and development costs which will be considered hereafter.

(10) The considerable expense for legal fees, travel expense and other costs to which Western is put in connection with this proceeding.

These costs cannot be determined on this record. Their amount would not materially influence the consideration. They seem to me, however, in the same category as costs legitimately incurred in the acquisition of a new certificate. These latter costs have commonly been recognized as extension and development expense that can originally find its way into investment. For this reason I would allow their eventual inclusion. [1807]

3. Going-Concern Value

In its effort to justify some base for the \$1,500,-000 of the purchase price not represented by tangible assets, Western argues that there is an intangible going-concern value attaching to Route 68. It asserts that, as distinguished from the acquisition of a new route, United can immediately begin to operate Route 68 with no interruption in service or in the continuity of reservations.

Going-concern value by now has been generally relegated to its appropriate position in public utility regulation.⁸ Originally there seemed to be

⁸For a portrayal of the confusion on legal and economic thinking surrounding the concept of going

considerable plausibility to the dictum uttered by the Supreme Court in 1915—"That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident." *Des Moines Gas Co. v. Des Moines*, 238 U.S. 153, 165. A statement to this effect has reality in the case of businesses operating under full and free competition with prices governed by the competitive forces of the market and not subject to control by a regulatory authority. In commercial appraisals, good will in combination with going value has often more significance than the value of the physical assets. It represents earning capacity and as such reflects itself in "value"—the market's judgment as to the extent of earning capacity that can attach to a particular group of assets. [1808]

But earning capacity, except insofar as it exceeds something in excess of a fair return, in the case of a public utility has relationship to investment. Going-concern or good will value thus represents expectations of earnings in excess of a fair return on investment. To recognize an element of value of this character and to admit it into the rate base is thus simply to pyramid against the public, government's ineffectiveness to limit earn-

value in 1930, see Report of Commission on the Revision of the Public Service Commissions Law, N. Y., Leg. Doc. No. 75 (1930), p. 35 et seq. This portion of the report was written by Mr. James C. Bonbright, whose contributions to the law and economics of public utility regulation are, perhaps, the most outstanding of the past two decades.

ings to a fair return on investment. This is more than ever true in the case of a subsidized enterprise which throughout its developmental period is guaranteed a fair return.

This, of course, is not to say that there is no difference between a going business and one—to use the words of the Supreme Court—“not thus advanced.” To establish a going business, costs have to be incurred. These costs may, depending on their nature, be capitalized subject to appropriate amortization or charged to operating expense. To the extent that they have been amortized or have been absorbed by revenues, the public has already paid for them.⁹ [1809] To then include an item for going

⁹The cost attaching to the risks of inadequate earnings in the early developmental period is automatically recognized in the percentage rate of return. The rate of return is fixed at a level calculated to permit the carrier to earn a return adequate to attract capital to the enterprise. That rate of return inevitably reflects the risks inherent in the investment, including the possibility of inadequate earnings in the early years. It is impossible to segregate these risks from other risks which influence the cost of capital and are reflected in the rate of return. A larger rate of return is ordinarily necessary in the early years of an enterprise when these risks are present. If the undertaking is successful, these risks disappear, and their disappearance is evidenced by the smaller yields at which the company's securities sell in the markets. The rate of return may then be correspondingly reduced by regulatory action. Thus going-concern value as an allowance for the losses incurred in the developmental period of the business has no place in the rate base; all such costs are fully and adequately compensated for in the rate of return.

value or good will, is not only to make the public pay twice for the same thing but to give the utility an investment against the public with the public's money upon which the public is called upon to provide a fair return. A more sinister means of extracting money from the public is difficult to imagine.¹⁰

As of today the exclusion of going value from a rate base is fully supported as a matter of law. *Los Angeles G. & E. Corp. v. Comm.*, 289 U. S. 287, 313-9 (1933); *Columbus G. & F. Co. v. Comm.*, 292 U. S. 398, 412-3 (1934); *Denver Stock Yards Co. v. U. S.*, 304 U. S. 470, 479 (1938); *Federal Power Commission v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 589 (1942). Citation of these au-

¹⁰This was discussed in the report of Commissioners Walsh, Bonbright and Adie on the Revision of the State of New York's Public Service Commission's Law, *supra*: At page 361, "But the indefinite nature of the concept of going value, and the arbitrary, meaningless percentages which are so solemnly 'found' by the Commission as an expression of this value do not constitute by any means the sole objection to the present practice. A more positive objection is to be found in the fact that an allowance for going value, based on a percentage of the costs of the physical property, must result in giving to the companies the right to charge the public twice for the same thing;" and at page 362, "Surely the injustice of a system of regulation which permits a company to earn a full return on its new capital as fast as that capital goes into public service, but which nevertheless permits the company to claim an unearned increment called 'going value,' which increases as the property investment increases, must be obvious to anyone whose point of view is not hopelessly biased."

thorities [1810] should suffice to dispose of this claim.¹¹

4. Franchise or Certificate Value

Although Western claims that the other intangible values above enumerated are sufficient to support the payment of \$1,500,000 in excess of the

¹¹It is asserted to be the law that a community in acquiring a public service corporation by purchase or condemnation must make compensation "under some circumstances" for its going-concern value and its franchise. *Omaha v. Omaha Water Company*, 218 U. S. 180 (1910), and *Monongahela Navigation Company v. United States*, 148 U. S. 312 (1893), are cited in behalf of this proposition. The cases fail to support such a doctrine. *Omaha v. Omaha Water Company* involved a bill to enforce the specific performance of a contract between the City of Omaha and the Omaha Water Company for the purchase of a system of water works. The contract provided that the price should be determined by appraisers. In an earlier proceeding the appraisers had been ordered by a lower Federal Court to include in their estimated valuation "going value." They did so. In this proceeding, the City, having rejected the award of the appraisers, sought to defend against the bill for specific performance upon the grounds of misconduct of the appraisers. The Supreme Court of the United States merely held that in this case no misconduct could be found on the part of the appraisers as a whole and that the action of the appraisers in including "going value" could not be considered as misconduct. In the *Monongahela Navigation Company* case—a case decided in 1893—the United States condemned a lock and dam belonging to that company and an issue was raised as to the compensation that was

physical assets, it is plain that these claims are both groundless and sinister. But Western further asserts—an assertion joined in by United—that operating rights, the certificate itself, can be taken into consideration in determining the allowable purchase price.

Western bases its argument in this connection on the Board's opinion in the Second Marquette Case, 2 C.A.B. 409, the pertinent [1811] part of which is quoted in a footnote.¹² If that decision is to be followed, Western is correct. Moreover, if that opinion is to be followed, I see no basis for disapproval of any portion of the purchase price of \$3,750,000. If we can and must recognize "the

due. The company held a franchise from the State of Pennsylvania authorizing it to exact tolls. The Court held that the franchise had value as a right to earn money and should be paid for. In other words, it simply regarded the whole property of the company as having an earning capacity due to the existence of the franchise. This is obviously not authority for the doctrine that a franchise of a public utility has a value over and above the earning capacity of the property to which the franchise attaches.

¹²"While we believe that the Board reached the correct result in the first instance in the light of the evidence then presented and the purchase price then proposed, further reflection on the issues raised in the proceeding leads us to the conclusion that in passing upon the reasonableness of the price the Board should take into consideration all types of value which are in fact elements in the fixing of the exchange value of property. It is clear that

right to operate the route" as "an element which the parties necessarily take into consideration in determining the price which they are willing, respectively to receive and pay," there is no rational ground upon which to base any reduction in the agreed price of \$3,750,000. There is no hint of fraud or overreaching in this bargain. The parties to it were shrewd business men, each of them justifiably seeking the best bargain for his company. On this theory I know no basis upon which this Board can say the certificate value is less or should be less than the parties concluded it was. They are close to the property and far more familiar with it than this Board ever can be. [1812]

But I believe the Second Marquette Case is wrong and should be overruled. The certificate is a matter of free public grant. The holder of it acquires the right and the responsibility to operate the route as a trustee for the benefit of the public. So important is that trust to the welfare of the mail service, the commerce, and the national defense of the United States that the Congress has authorized us to provide the holder with a fair return upon the

in the sale of the property of an air line the value of the right to operate the route is an element which the parties necessarily take into consideration in determining the price which they are willing, respectively to receive and pay. The existence of such value in the exchange of property, as distinguished from value for rate-making purposes, has long been recognized by the courts and regulatory commissions." *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C.A.B. 409, 412 (1940).

investment as compensation for the performance of these services.

It would be unthinkable in the long and proud law of trusts that a trustee should be enabled to dispose of his trust for a price. It would be bad enough if that price were paid to the trustee by some third party, but it is literally sinful to permit that price to be paid the trustee by the very public that originally granted him the trust.

Such a concept is not only implicit in the Civil Aeronautics Act; but it has also been made explicit by the Congress. Section 401 (j) of that Act provides: "No certificate shall confer any proprietary, property, or exclusive right for the use of any air space, civil airway, landing area, or air-navigation facility." The language is clear, unmistakably clear.

Some support for a contrary doctrine is alleged to inhere in decisions of other regulatory commissions, particularly the Interstate Commerce Commission. With due deference to their judgments, if their judgments really are to this effect, I must decline to follow them. They are not binding on us. Certainly the roll of authorities culled from the reports of the Interstate Commerce Commission in which intangible values, three or four times those [1813] of the tangible values, have been approved is hardly a catalogue that invites emulation. As portrayed it reminds of unbridled speculation with the public the unwitting victim. Actually the picture is not so bad as portrayed. The motor car-

rier industry is a highly competitive one as distinguished from air transport. It is not subsidized. Nor has any effort been made to relate returns to investment.¹³ Instead, being as highly competitive as it is, reliance can be placed upon competitive forces to keep returns at appropriate levels.¹⁴ Even so the corporate fatalities and public losses in the motor carrier field throw considerable doubt upon the wisdom of the Interstate Commerce Commis-

¹³“We recognize that the investment of a motor carrier in tangible property is relatively small as compared, for example, with the corresponding investment of a railroad company, and that this fact must be considered in determining the return which a motor carrier may fairly be allowed to earn.” Union Bus Lines, Incorporated—Purchase—Joe Amberson, 5 M.C.C. 201, 205 (1937).

¹⁴Competition has not only placed a ceiling on charges but has so reduced rates that the Commission has acted in many instances to place a floor under rates through minimum rate orders. There is, moreover, no mechanism for giving public assistance to keep an ailing carrier in business, and no great harm to the public results if any particular carrier fails and either withdraws from business or undergoes reorganization. New carriers can readily enter upon motor carrier operations as the initial investment need not exceed the down payment on one truck, perhaps only a second-hand truck. Further competitive pressure on rates for highway carriage stems from the large volume of private carriage, for even a modest enterprise may own its own trucks and carry its own goods without the formality of securing a certificate of convenience and necessity. A more inapplicable pattern for air transportation would be difficult to find.

sion underwriting this [1814] speculative activity.¹⁵

¹⁵Indeed, one would wish that the Commission had taken more to heart the language found in Division 5 of Commissioners Eastman, Lee, and Rogers, in *Union Bus Lines, Incorporated—Purchase—Joe Amberson*, *supra*, at 204-206:

“It is well known that one of the great evils which has developed in connection with the railroads and public utilities of this country in the past, and from which both they and the public have suffered severely, has been the ill-advised purchase of properties or controlling interests therein at extravagant and unwarranted prices, in connection with the building up of large systems, and the result of this evil has been particularly serious where indebtedness has been incurred to meet the purchase price. It was to prevent this evil, among others, that in the Motor Carrier Act, 1935, we were given jurisdiction over consolidations, mergers, leases, purchases, and other methods of bringing under common ownership or control the properties of two or more motor carriers.

“If transactions of this character are to be approved and become at all common and widespread, the burden which they will place upon the motor-carrier industry must be obvious. The investment in operating rights, which initially cost little or nothing, will vastly exceed the investment in the physical property actually used in conducting the operations. We are unable to believe that such a situation is healthy or should be permitted to develop. Suppose, for example, that a system of bus operations were built up by purchases at such prices and involving such obligations and that a competitor should come into the field seeking operating rights from us on the ground that, if they were granted, it could furnish better service at lower fares because of its freedom from similar

No other administrative precedents have been produced.¹⁶ [1815]

5. Market Value of the Enterprise

It is asserted that, independent of such analyses as have been made, a route such as this has an over-all market value, that the price being paid is the market value and as such it should have our benediction. Whether a route has a market value is difficult to state. There is fortunately no extant market as yet for routes where buyers and sellers congregate and prices are quoted and made. But it can be asserted that an honestly and fairly negotiated value, such as characterized this case, is the equivalent of market value.

Certainly airline securities have market values. These values rarely coincide with book values based upon investment. Similarly the "market value" in this case does not coincide with book value, but, since it was reached by arm's length bargaining,

obligations. Would we, in such circumstances, be justified in denying the public the opportunity for better service at lower fares?"

¹⁶The Case of Matter of Powel Crossley, Transferor, and the Aviation Corporation, Transferee, Docket 6767, decided August 2, 1945, by the Federal Communications Commission has been cited. The language used in that decision is not too happy, but the case is not pertinent, for although the Commission permitted a value to be placed on a broadcasting license, the Commission was not dealing with an industry that was a common carrier and whose earnings were subject to public regulation.

it is asserted that it should be recognized and approved.

The essence of any market value is the estimation of future earning capacity or return. Its variation from book value is due to several factors.¹⁷ Among these the most important are the judgments made by interested parties that the return actually earned by the enterprise will be above or below that provided by the regulatory agency, or the judgment that the return allowed on investment by the regulatory authority is not "fair" in the sense that it is above or below the return that can be earned on investments with equated [1816] hazards in other enterprises. The money market is an integrated whole following something akin to the reverse of Gresham's Law in that it will seek its outlet at the highest possible levels of return on investment.

Thus market values in excess of book values in the public utility field represent the judgment of investors either that government will not be effec-

¹⁷In the discussion that follows contrasting market value with book value, a factor that naturally affects the relationship between the market value of a particular security and its book value is the presence of "leverage." The degree to which that is present is of course dependent upon the capital structure of that particular enterprise. But the existence or non-existence of "leverage" is not relevant to the discussion of the relationship of market value and book value above. Contrariwise, any comparison of existing actual market values of airline securities with book values for those same securities, which excludes this element of "leverage," is meaningless.

tive in holding earnings to a fair return on investment or that the fair return provided by government is at a level in excess of the return generally available elsewhere on investment with equivalent risks. When an industry is subsidized, market values below book values represent again the market's judgment as to the ineffectiveness of government to realize upon its promise of "fair" subsidy.

This is not to say that market value in excess of book value does not exist. The market itself, this very transaction, is proof of the fact that it does exist and that it has a tangible verity for which investors are willing to pay hard, cold cash. But the very essence of that market value is its speculation on the inadequacy of government in the public utility field to limit rates—or taxes, as Mr. Justice Brandeis more adequately described the economic incidence of these payments—to a fair return on investment. For us to recognize these excessive earnings as an element of value is to pyramid against the public the cost of our own regulatory inadequacies. Admitting that they exist and will exist, at least we should not fold them permanently into a rate structure and fasten permanently on the public the resulting costs. [1817]

6. The Theory of Quarantine

I believe that the majority generally accepts the validity of this reasoning. There is no intent on the part of the majority to provoke inflation in the field of air transport. But imbued by their recogni-

tion of the fact of market value, their deference to the alleged practicalities of the situation and its assumed honest and commonsense aspect, they are willing to approve this increase of price over investment and believe that by an accounting device the inflationary aspects mentioned can be eliminated.

The theory seems to be that the excess of the price over investment—some \$1,500,000—can be charged immediately to surplus and in that way never enter the rate base and thus never be a ground for higher rates or higher subsidy.¹⁸ In other words, the stockholders will pay out this \$1,500,000 and not the public.

¹⁸The only support for this theory that I have been able to discover is *Mason & Dixon Lines, Inc.—Purchase—Cox*, 36 M.C.C. 475 (1941). The case, however, never really considered the problem. *Re Virginia Electric & Power Co.*, 53 P.U.R. (N.S.) 70 (1944) is a merger case which raises different considerations. *Pacific Power & Light Co. v. Federal Power Commission*, 141 F. (2d) 602 (C.C.A. 9th, 1944) and *California-Oregon Power Co. v. Federal Power Commission*, 150 F. (2d) 25 (C.C.A. 9th 1945), cert. den. 66 Sup. Ct. 366 (1946), do not touch upon the problem. They simply authorize the Federal Power Commission to require the charge off of write-ups already on the books created by acquisition prices in excess of original cost.

The citations to the Federal Power Commission's practices, like the earlier citations to the Interstate Commerce Commission, are invalidated by the failure to recognize essential differences in the factual situations of the two industries. The Power Commission is dealing with companies long unregulated in many essential respects, with books reflecting

Before dealing with this concept, which seems to me ostrich-like, a few preliminaries must be disposed of. The first of these is the assumption that accounting is a creative science. The function of accounting [1818] is rather merely to report for the benefit of others in a limited form the story of corporate management. In faithfully reporting or threatening so to report it may well restrain management from doing what it otherwise might do were no such reporting to be made. But an accounting technique or device or theory cannot erase the economic consequences of a corporate act. They remain, whatever the reporting. True, the reporting may affect the future action of others, because man as a reasoning animal guides his actions by the data that are available to him at the time. But the fact remains that certain action has been taken, whatever the report to the public or to government may be.

In the second place, the meaning of a charge to surplus deserves exploration. In too many minds the theory persists that surplus is the equivalent of cash in the bank. Too few people recognize that surplus or deficit, as the case may be, is simply a

write-ups and securities in excess of investment. This Board has an industry where its freedom of action is not impaired by write-ups and overcapitalizations. In each of the cases noted above, the Power Commission was effecting an improvement for the public; that is, securing a write-off of water and improper intangibles; by contrast the Board is saddling additional burdens on the public, moving in the opposite direction of the Power Commission.

balancing entry between assets and other debits on the one hand and liabilities and other credits on the other. Surplus, as such, is not necessarily proof of the soundness of a business enterprise. Too frequently enterprises have been forced into bankruptcy or receivership despite large surplus accumulations for the simple reason that they cannot pay their bills.

The existence or non-existence of surplus is thus not necessarily a demonstration of financial ability on the part of an enterprise to engage in new ventures. Moreover, surpluses even where they represent an excess of current assets, have a tendency to disappear when business conditions turn downward. With the volatile and fluctuating conditions that characterize air transport these days, this tendency is more than normally manifest. Indeed, where as now the majority believes that United's fifteen million dollar surplus is proof of an ability to pay, [1819] scarcely a year ago a majority of the Board in the original opinion in the West Coast Case, 6 C.A.B. 961, declined to extend Western from San Francisco to Seattle resting its decision largely on the ground that United's financial condition was such as to make it inadvisable for the Board to subject it to increased competition.¹⁹

¹⁹United's ability to dissipate its funds may not be judged simply in terms of the recited figures. Its net income after taxes has declined steadily from \$7,024,000 for 1944, to \$4,669,000 for 1945, to \$1,804,000 for 1946, to a net loss from operations of \$1,871,596 (\$961,169 after tax refund) for the twelve months ended March 31, 1947 (the last

In the third place, I see no fundamental difference between charging this \$1,500,000 to surplus and amortizing it "below the line" over a period of time. Under the first method it is charged off against surplus accumulated as a result of past earnings; under the second method it is charged off against future earnings. If the payment constitutes a sound investment for management to make, either method should be perfectly acceptable. Indeed, if it is a sound investment, there is no reason not to charge it against surplus even if that charge creates a deficit. To incur a deficit in the hope of future and increase gains is frequently a

figures coming from Exhibit U-13). For the six months ended June 30, 1947, United reported a net loss from operations of \$4,673,165, and a net loss after tax credits of \$3,200,000. (American Aviation Daily, August 12, 1947.) United carried \$3,460,000 to surplus in 1945 but only \$771,000 in 1946. Moreover, United's cash position on which the majority relies reflects recent extensive financing which was designed to provide \$49,500,000 capital for the carrier's \$85,165,000 expansion program. In February, United received some \$12,000,000 from the sale of its 3½ per cent debentures of 1967 to two insurance companies, and over \$9,000,000 from the issuance of 4½ per cent cumulative preferred stock. It had also arranged a bank credit of some \$28,000,000 through the National City Bank, and as of June it would appear that \$9,000,000 of this credit had been drawn. All in all, this is not a picture of a carrier having surplus funds to dissipate in purchasing a certificate which the Board could award without cost to the carrier. Any funds used by United in purchasing the certificate for Route 68 may very well require the raising of new capital.

function of wise management. In other words, no choice of accounting treatment will help one evade the issue as to whether a [1820] payment of this character is a sound investment for management to make. And if it is a sound investment for management to make, why should there be an insistence that it should be charged off and not be an appropriate item in the rate base? The truth of the matter, as I see it, is that it will not be charged off in any true economic sense whatever the accounting treatment.

Before developing that thesis, this suggestion of the majority seems to me to present an inescapable dilemma. If the payment of this \$1,500,000 is to be approved by the Board in this proceeding, the Board must certainly treat that action of United's management as being efficient, honest, and economical. But at the same time the suggestion is made that the very payment should be excluded from the rate base. To justify this latter position, the payment of this money must be regarded as not being a prudent investment for United to have made in acquiring Route 68. But the Board has just found it was a prudent action for management to undertake. In the light of that finding I can see no logical reason that would justify the exclusion of this investment from the rate base. It certainly cannot be excluded on the ground that it was not a prudent cost for the Board has just formally found it to be that.²⁰ But the suggested exclusion of this payment

²⁰Perhaps this simple logic explains the paucity of any support for this accounting treatment by

from [1821] the rate base implies a finding diametrically opposed to the finding that justifies the approval of the making of the payment.

This prestidigitation may not be so palatable to the courts. If, as a result of general business losses, United ceases to be in the class of self-sufficient air carriers, the Board will have to provide it with a subsidy mail rate related to the need of the carrier which will provide the carrier with a fair return on investment. Will the Board then be able to say that what it deemed to be wise in this proceeding has now become an unwise exercise of corporate judgment and therefore is not a prudent investment? In essence the suggestion says that from an [1822]

other regulatory agencies. It is true that in TWA Mail Rate Proceeding, 4 C.A.B. 139, the Board did eliminate from TWA's rate base that portion of the purchase price of Marquette that represented intangibles and that was finally allowed in the Second Marquette Case, 2 C.A.B. 490. The inconsistency of the two actions of the Board is made manifest by the following two quotations.

From the Second Marquette Case, *supra*, at 414:

"In view of these facts now of record and the further evidence of operating results under the lease, we are unable to conclude that the new price exceeds the value of the tangible properties transferred to an extent which would make the transaction inconsistent with the public interest. Also it must be remembered, in considering all elements of the exchange value in this case, that Marquette's operating losses, in part at least, were incurred not only in the exercise of a privilege granted by public authority, but in the performance of the duties and obligations which the law attaches to such a privilege."

accounting standpoint we will treat this as an imprudent investment but, since accounting is such an esoteric science, that fact will not be so patent as to prevent us from treating it as prudent corporate action so far as the purchase of Route 68 is concerned.

Surely it cannot be argued that because this \$1,500,000 is part of United's earned surplus it is in essence stockholders' money, and as such its dissipation by the carrier will not be against the public interest. Admittedly, if the \$1,500,000 had been paid out by United to its stockholders by way of dividends, those stockholders could individually

From the TWA Mail Rate Proceeding, *supra*, at 149:

"Included in 'Investments in and Advances to Affiliates' is the amount of \$313,333 representing the purchase price of the stock of Marquette Airlines, Inc. In the absence of evidence that any part of the purchase price represents actual and legitimate developmental expense incurred by Marquette, that portion of the purchase price exceeding the investment in the tangible assets of Marquette will be disallowed for present purposes. To this end there will be eliminated from the item of investments the total price of \$313,333, it being assumed that the tangible assets acquired by petitioner are properly reflected in other asset accounts."

The action of the Board in the TWA case was uncontested probably because of the fact that, as indicated in Member Branch's dissenting opinion, it appeared that the carrier would realize an overall operating profit of 46.16 per cent and an overall net profit of 27.7 per cent after 40 per cent taxes on its total investment used and useful in scheduled air transportation.

or collectively toss that amount into the ocean without its being the concern of anyone; but for United to take such an action with funds it could distribute as dividends to its stockholders would be a gross breach of standards of honest and efficient corporate management.²¹

I come now to the question as to whether some accounting device will effectively in a true economic and not a pictorial accounting sense prevent this payment, whatever it may be called, from getting into the rate base, thus eliminating the possibility that the public and not the stockholders will be the ultimate payers of this excess \$1,500,000. If the payment gets into the rate base on the theory of going-concern value, [1823] market value or franchise value, its inflationary aspects are patent. Can an accounting technique eliminate that danger?

²¹The difference is not merely technical; it is substantial. A trustee's duty is so to manage the estate as to produce the maximum amount of income to the beneficiary and after deduction of all expenses, including the trustee's compensation, to pay the balance to the beneficiary. What the beneficiary does with payments made to him is immaterial and has no effect upon the value of his beneficial interest in the trust. Similarly, the duty of corporate management is to manage the affairs of the enterprise so as to produce income for its stockholders, and after payment of expenses including the maintenance of reserves to pay the balance to the stockholders. The funds thus paid to the stockholders belong to them for such use as they deem fit, but so long as they are in the hands of management they remain impressed with the corporate trust.

It can be assumed that United's directors in approving this payment of \$1,500,000 in excess of the tangible earning assets transferred are not acting from eleemosynary considerations nor are they seeking to dissipate the assets of United. They confidently expect a return upon that investment of \$1,500,000. If they did not cherish these expectations, the investment would not have been made. That expectation may be founded on the belief that governmental action will be ineffective in limiting the return to one that is reasonable in the light of the investment exclusive of the \$1,500,000. But if we once permit that payment to be made, governmental action will inevitably be unable to limit the return to a reasonable return on the depreciated book value of the original investment.

That fact can easily be demonstrated. Assume that six per cent is sufficient to attract money to an air carrier and that six per cent is the fair return prescribed by governmental authority. Two carriers each have an investment of \$2,000,000. The second carrier for reasons that appear sound to itself agrees to acquire the first carrier for \$3,000,000. But under the doctrine of the majority the combined rate base for the two is limited to \$4,000,000 though the acquisition of the first carrier for \$3,000,000 is approved. How can the second carrier raise \$3,000,000 for this purchase in the market? By hypothesis, six per cent is necessary to attract money into the industry and return on investment is limited to six per cent. But six per cent on \$4,000,000 is \$240,000 or only 4.8 per cent

on the \$5,000,000 actually invested in the enterprise. Since the market price for money is six per cent, \$3,000,000 worth of common [1824] stock could not be sold since its yield by hypothesis could not exceed 4.8 per cent. To acquire \$3,000,000 on a six per cent basis,²² either the rate of return must be increased in excess of six per cent, or an additional earning asset of \$1,000,000 would have to be supplied. In either case the public would have to pay.

The situation is not altered if we assume that the second carrier instead of being required to raise the money has \$3,000,000 of earned surplus to finance the transaction. That \$3,000,000 is naturally not a part of the investment upon which it is entitled or guaranteed to earn the six per cent return. It nevertheless enhances the value of the stock of the second carrier over and above that book value of the stock upon which it is entitled to earn a six per cent return. The degree to which it does this is dependent either upon the expectation of dividend payments on the part of the stockholders or upon the degree to which the future investment of this \$3,000,000 in other assets will provide earnings and thus give a return in excess of the six per cent that is due upon its \$2,000,000 rate base. If then the \$3,000,000 is invested in an asset that can, under the doctrine of the majority, only return six per cent upon an investment of

²²Only by resorting to a senior security, preference stock or debt, could \$3,000,000 of new capital be raised to finance the purchase of only \$2,000,000 in earning assets.

\$2,000,000, the overall return to the stockholders of the company suffers, its securities sag, its credit suffers, and its service may deteriorate.²³ Only two

²³It may appear that the Board could refuse to permit earnings in excess of six per cent on the asset base of \$4,000,000, but this would result in the imposition of greater rather than lesser burdens upon the public. These burdens would be manifest in three developments: (1) a deterioration in the quality of service; (2) an impairment in the credit of the carrier with a resulting inability on the part of the carrier to raise new capital; and (3) an impairment in the investment standards of the industry and an increase in the cost of capital to all carriers. Each of these inevitable results of seeking to compel the carrier to operate at an effective rate of 4.8 on the investment will do serious injury to investors in and users of air transportation.

Impairment in the quality of service may seriously undermine safety standards. Management, in these circumstances, would be under constant pressure to squeeze every possible dollar to show the profit necessary to justify paying \$3,000,000 for earning assets worth only \$2,000,000. Maintenance procedures would be compromised; desirable but avoidable expenditures would be foregone; the number of employees would be kept at a minimum. All of these developments mean a series of compromises between maintaining fully adequate service and higher than minimum safety standards on the one hand, and providing barely adequate service at minimum safety standards on the other.

The impairment in the credit of the carrier resulting from limiting earnings to an effective six per cent on \$4,000,000, or 4.8 per cent on the full investment of \$5,000,000, will be evidenced in a decline in the price of that carrier's securities. Thus it might appear that the investor is paying the cost, and indeed some of them do if they then dispose of their stock. But restricted earnings and

ways exist to avoid this result. [1825] The first is to allow the carrier to earn more than six per cent on its \$4,000,000 investment. The second is to increase that investment to \$5,000,000. In either event the public pays.

This is putting the proposition in its simplest terms. In real life the analysis is never that simple. But in real life, reserves must be maintained to keep up the dividend record as against interim ad-

a decline in the price of the stock will effectively bar the carrier from going into the investment market for new capital. It must either limp along without new capital, to the detriment of investors and users, or the regulatory agency must permit the carrier to collect greater than reasonable revenues from the users of the service. In this situation the regulatory authority almost always capitulates and rationalizes its betrayal of its public responsibility with the argument that the users are primarily interested in getting good service and that in the long run they are willing to pay even premium rates for it.

The immediate effect of permitting such speculative transactions as that here proposed is to import additional risks into the industry, increasing the cost of capital. If it attempts to keep earnings at six per cent on \$4,000,000, or 4.8 per cent on \$5,000,000, the Board will discover in its next rate investigation that the cost of capital, the primary index in determining the appropriate rate of return, is increased for all carriers. Thus the Board is faced with the necessity of recognizing an inflated return not for one carrier, but for the entire industry. Under these circumstances, it would be less burdensome for the public if the Board supinely permits the offending carrier to receive the full fair return of six per cent on the inflated investment of \$5,000,000.

versity. In real life, it may be that reserves of this type are drawn against with the consequent though perhaps imperceptible weakening of the credit standing of the carrier. In real life, three things may [1826] guard against that weakening. The first two have already been mentioned, namely, increasing the rate of return or inflating the rate base. The third is the inadequacy of government to hold actual earnings to the designated fair return. All three are equally sinister. All three mean that the public eventually pays.

To believe that these economic consequences that attend a transaction of this character can be restrained or put to naught by some accounting device is folly.²⁴ A manipulation of accounts cannot cure the fact that a dissipation of assets has taken place. And that is what remains true when \$3,000,000 has been paid out for an asset that should earn only a fair return on \$2,000,000. The Board may, of course, bury its head in the sand and pretend that this has not taken place. But it has if the Board is to discharge its high responsibility of limiting returns to a fair return on investment. Actually, it is not likely to do so. Instead, inflation is certain to take place.²⁵ [1827]

²⁴Particularly is this true of the accounting suggestions advanced by United in this case, as witness their proposed treatment of the transaction in the pro-forma balance sheet submitted by United, and attached hereto as Appendix A.

²⁵A considerable degree of confusion is introduced into this issue by thinking that a \$3,000,000 earned

I am, of course, fully cognizant of the difficulties of limiting the earnings of public utilities to a fair return on investment, especially in such an integrated and diverse field as that of transportation. And market values in excess of book or investment values reflect this difficulty. But the duty so to limit earnings rests on this Board. It may eventually, when a period of relative stability in air transportation arrives, come closer to that goal. But in the meantime it cannot and must not make achievement of that goal impossible by approving a course of conduct that over the years will inflate air carrier investment and force the public to pay again and again for certificates that it issues not only without price but with the assurance that their holders will make a fair living for conducting those operations that the certificates authorize. [1828]

surplus is stockholders' money. If a stockholder pays in excess of book value bottomed on a rate base for a share of stock and that excess, due to the capacity of government, is eliminated because the rate of return is kept to a fair return on investment, no harm is done save to that stockholder, whose survival as an entity capable of attracting money into his ventures has no public interest and evokes no public concern. His bankruptcy or loss of savings does not affect air transportation, except in the one way that reinforces the argument that has been made. He and "his cousins, and his sisters, and his aunts," may become shy of airline securities as a result of his unhappy experience. The market—or the price that airlines have to pay the public in order to induce the public to invest money in the airlines—will suffer. Something will then have to be done about this phenomenon. The only cure is again inflation. In that event, the public again pays.

7. Extension and Development Costs

Reference has been made before to the problem of extension and development costs. To the extent that these are legitimately incurred and have not been amortized and are not chargeable to revenues, they represent costs that are appropriately part of the investment. The costs of acquiring the certificate are of this character. Mere losses incurred in the operation of a route are not.²⁶

Western makes several claims for the inclusion within the purchase price of items of this character. Four categories total \$372,326, representing flight training costs of \$229,215; stewardess and dispatcher training costs of \$15,195; advertising costs of \$78,275; and pioneering and developmental costs of \$49,641.

Western's profit in the operation of this route amounts to some \$640,000, for the reported period or the equivalent of a return of nearly 39 per cent on an annual basis on the tentative investment of \$2,205,675. Most of these costs thus have already been absorbed by revenues and to admit them into the investment account for Route 68 would simply be to ask the public to pay twice to them.

The present record, however, does not definitely

²⁶As Mr. Justice Brandeis stated in *Galveston Elec. Co. v. Galveston*, 258 U. S. 388, 395 (1922): "The fact that a utility may reach a financial success only in time or not at all is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in determining what the base value is and whether the rate is confiscatory."

permit the exclusion of all of these costs or the inclusion of some. It may be that in the category of pioneering and development costs some items exist which have not been covered in operating expenses and which are properly chargeable to the investment. To the extent that they are [1829] so chargeable, the purchase price can justifiably be increased.

The same treatment should be accorded other claims of Western that were noted before. Many of these are undoubtedly already embraced within the category of \$49,641 for extension and development costs. To the extent that these have not been previously included and are properly part of Western's unamortized investment in Route 68 and not operating expenses, they can be recognized as part of the purchase price.

8. The Consequences of the Majority Doctrine in the Field of Mergers, Consolidations and Route Transfers

The consequences of the majority doctrine are inflationary. But equally serious are its consequences in the field of mergers, consolidations and route transfers. The likelihood in this field is that either the majority doctrine will provoke a series of mergers and route transfers that will be irrational and unfortunate in the extreme because they will be dominated by the principle of selling to the highest bidder,²⁷ or else the doctrine, [1830] what-

²⁷Speaking of what has happened in the railroad field in the way of consolidations Commissioner Eastman had this to say: "These system-making

ever other initiatives for such mergers and route transfers might exist, will bring about a stalemate.

If a negotiated price honestly arrived at is to be approved by the Board irrespective of investment, the Board is inviting certificate holders to retain uneconomic and unintegrated routes to await the advent of the highest bidder. The majority doctrine is, indeed, an invitation to certificate holders to join in a game in which they inevitably win and the public inevitably loses. For the holder of the certificate so long as he holds it loses nothing, assuming proper management, since subsidy will recoup for him his operating losses. Nor under this doctrine can the Board take the position that honest, economic and efficient management calls upon the holder to dispose of the route at any proffered price for the holder can assert with little

operations through holding companies and the like violated principles of sound finance as well as the law. The record contains startling comparisons of the prices paid for stocks with their present market values. The story is so familiar that I shall not attempt to cover it here. Much of the extraordinary shrinkage is due, of course, to the economic depression. More important are the facts that in many instances the prices paid were very high even when measured by the inflated standards prevailing at the time when they were paid; that these purchases had the effect of accelerating the current inflation of security prices; that large debts were incurred in the acquisition of mere stock equities; that surplus funds were so used which ought to have been conserved; and that investors were enticed into the perilous holding-company field." Consolidation of Railroads, 185 I.C.C. 403, 444 (1932).

fear of contradiction that an opportunity to sell the route for a higher price is just around the corner and not to await that opportunity would be grossly inefficient management. So the public continues to pay so long as the route is held. And when the route is eventually sold, the public is again called upon to pay because of the inflation introduced by the excess of the purchase price over investment.

Under such a doctrine no criterion can ever be found to determine when management should as a matter of efficiency and economy dispose of a route instead of continuing to operate it at a loss, exclusive of subsidy. In this case the excess price is only some \$1,500,000. In the Second Marquette Case it was some \$260,000. But the next case may produce an excess of \$5,000,000 or \$10,000,000 or \$20,000,000—all bargains honestly [1831] arrived at between shrewd traders. I fail to see how the Board under the doctrine it has announced can place any limit on such values. If it should it must “re-trade” the deal in defiance of the factors that have led men to agree to pay hard money for what they have contracted to buy. For the Board to attempt to assume such a responsibility is both dangerous and impracticable.

The doctrine I advocate would relate allowable sales and purchase prices to a criterion of investment and would furnish standards against which the efficiency and economy of management could be measured and subsidy granted or denied management dependent upon its conformance to these

standards. For with such a standard in existence the unwillingness of management to dispose of an uneconomic route at a price that is fair because it is bottomed on investment would be the basis of a charge of lack of economy that would justify reduction in subsidy. In this way government could both correct the inertia of management and restrain its greed.

Indeed, there is much evidence to indicate that the doctrine of the Second Marquette Case as reaffirmed by the action of the majority in this case is responsible for the absence in the air transport field of those healthy route adjustments that should characterize it today. Admittedly particular routes and even perhaps whole systems should, in the interest of sound integration, be transferred to or absorbed by other systems. But little action in this respect is evident. The stumbling block to route transfers and mergers is not a division of opinion on the desirability of a particular [1832] rearrangement. The stumbling block instead is price. Would-be acquirers hesitate to pay the inflated prices that are asked for fear that they will not of a certainty pass that inflation on to the public. And meanwhile the administration of subsidy upholds the hands of potential sellers in their inflationary demands. And inaction results.

Only exceptional circumstances bring these transactions to the point of fruition. They may consist, as seemed true in the Pennsylvania Central-Northeast proposed merger, of an exaggerated belief in the earning capacity of the acquired routes when

consolidated with the old, so exaggerated that the inflated price thus agreed upon would in the judgment of the acquiring management be justified by a rate of return wholly disproportionate to investment and beyond the immediate power of governmental authority to cure.

Exceptional circumstances existed in this case. Western's financial stringency made ready cash a necessity. Bankruptcy was threatening and the possibilities of increased earnings in the future or increased mail subsidy were too remote and too uncertain. United, on the other hand, had been struggling for years to get into Los Angeles from the east. It had failed to do so from Salt Lake City when the Board disapproved its attempted acquisition of Western. It failed a second time when the Board awarded the Denver-Los Angeles route to Western instead of to United. At the time this opportunity presented itself United was in the midst of making its third and fourth attempts to reach Los Angeles in proceedings then pending before the Board whose outcomes were in doubt. Under these circumstances a price of \$1,500,000 over and above tangible assets might well appear reasonable. [1833]

A concatenation of circumstances such as these is rare, while the need for a better integration of the route pattern of the United States is immediate. That pattern was originally muddled by the grandfather routes. Its re-ordering is made imperative by the advent of new equipment. Built originally for the DC-3, it is inadequate for the

DC-4, the DC-6 and the Constellation, while the Convair 240's, the Martin 202's and 303's, and the Boeing 377 are already in the offing. An approach that is both practical and has due regard for the public interest is demanded.

Curiously enough that type of approach was suggested in argument by Western but with reference to its subsidiary, Inland Airlines, rather than Route 68. Western intimated that in the event the sale of Route 68 was approved, Inland would prove to be of little value to its system and Western would therefore place Inland on the block before the Board to be disposed of to such purchasers and at such prices as the Board might deem best. This was an eminently wise, just and practical approach. But such an approach naturally follows when by holding price to investment, competition in terms of price is eliminated between potential buyers. The sole criterion remaining is then that of the public interest in the most efficient integration of the airlines.

Price competition for mergers or routes has an equally baneful influence if it succeeds. Integration and the public interest cease to be guides. Instead the highest bidder controls with the result that either this Board is driven to approve a transaction that possesses doubtful merit, or to disapprove it, which leaves the industry in a stalemate.

The problem of eliminating through acquisitions, weak lines or weak [1834] segments of lines has baffled the Interstate Commerce Commission in the railroad field over thirty years. Despite almost

herculean effort progress has been negligible. And in the stagnation that has resulted doctrines of valuation have played their part. In the air transport field, however, the problem is relieved of elements of difficulty that plague the railroads. Accurate records of investment exist and inflation to date has been held to a minimum. There is moreover the powerful instrument of subsidy. That operated to underpin a weak system or a weak line so that acquisition of it is free from those elements of hazard that attend the acquisition of a weak railroad, for the property in the field of air transport carries with it the obligation of government to provide a fair return not merely, as in the case of rails, the opportunity to earn a fair return.

The results of the majority doctrine are thus not only inflationary, the majority throws away a powerful instrument that wisely used could transform our air network from the patched up quilt it now is to an integrated and economic pattern. No instrument remains now to force desirable integrations other than the threat of bankruptcy consequent upon inefficient management or insufficient subsidy. Bankruptcy is a cruel and heavy bludgeon that unfortunately admits of no planned development. The results that bankruptcy may achieve may accord with the public interest but only as a result of happenstance rather than design.

9. Conclusion

It is with some regret that I come to the conclusion that this transaction must be disapproved

unless the parties agree to reduce [1835] the price some \$1,500,000 or whatever will be necessary to reflect investment in Route 68. I cannot under the guise of the theories advanced agree to permit the parties to traffic in air certificates. There is, as Congress has stated, no private proprietary right in air transportation that can be made the subject of barter and sale—the subject of an additional claim against the public. A hundred and fifty years ago public office was also regarded as a property right. Commissions in the days of Pitt the Younger were bought and sold. But a new world took a different view of that trade. Today we unhesitatingly regard it as immoral. Some newer world may similarly come to regard this traffic in certificates of convenience and necessity as not only uneconomic but also as immoral. But until then the public will have to pay.

Apart from price, this transaction seems to me to be in the public interest. It will round out United's system, particularly in the light of our recent authorization to United to serve Los Angeles from Chicago and points east. While so long as Western retains Route 68, Western will have to maintain transcontinental ambitions that seem to me unwise and are certain to be costly.

Again Western's financial plight is such that \$3,750,000 would be of enormous help to the new management in rebuilding the system and rehabilitating it against the errors of the past. But the public should not be made to pay for those mistakes of a past management. Certainly, if the pub-

lie is to pay for those mistakes, it would be far cheaper in the long run for the public to make an outright gift to Western of \$1,500,000 rather than introduce a doctrine that will promote inflation, make against an integrated route pattern and at the same time cost the public \$1,500,000, and more. The sensible [1836] procedure to follow, if it is deemed wise to preserve Western, would be reorganization effected through a governmental loan rather than through the time-consuming and costly processes of a judicial proceeding.

Moreover, Western in giving up this \$1,500,000 is actually giving up very little. For that \$1,500,000 under any theory is profit to Western and as such is revenue under Section 406(b) of the Civil Aeronautics Act which the Board must take into consideration in fixing any need rate. The Board thus must in the last analysis charge the subsidy that Western will get and upon which it must depend with that amount, so that in the end Western's acquisition of \$1,500,000 becomes only a temporary advance against future subsidy payments.²⁸ [1837]

But irrespective of considerations that might well

²⁸An off-the-record factor tends somewhat to distort Western's position. Western has applied to the Reconstruction Finance Corporation for a loan which was to be approved on the condition that this Board would permit the transfer of Route 68 for \$3,750,000, those proceeds in the judgment of the Reconstruction Finance Corporation adding to the security of its loan. This Board, of course, declined to intimate to the Reconstruction Finance Corporation what its ultimate action on this proceeding would be. But the condition imposed by

stir some sympathy for Western the issues presented by this proceeding far transcend the importance of this case. The bankruptcy of one carrier, if that were to happen is as nothing to the potentialities of inflation that the majority doctrine invites. And temporary disruption of one or two systems is little in comparison with the failure to provide any cure for the imposed and progressive lack of integration that today characterizes the air pattern of the United States.

/s/ J. M. LANDIS. [1838]

the Reconstruction Finance Corporation has no true meaning. The \$1,500,000 will have to be counted against future subsidy to Western, so that its net available for the reduction of the loan is not increased by the receipt of that sum. True, the \$1,500,000 comes from another pocket, that of United, and the payments made by the United States in the form of subsidy will be pro rata reduced. Without the receipt of \$1,500,000 the payments would naturally not be reduced. The net available for reduction of a loan over the period remains the same, provided that Western stays in the "need" class of air carriers which it undoubtedly will.

Appendix A

United Air Lines, Inc.

Summarized Balance Sheet—March 31, 1947

(Before and After Proposed Denver-Los Angeles Route Acquisition)
(Submitted as Exhibit No. U-12)

Assets	Before	Adjustments	After
Current Assets			
Cash and Marketable			
Securities	\$13,064,800.28	(\$2,750,000.00)	\$10,314,800.23
Accounts Receivable ..	8,378,336.35		8,378,336.35
Materials and Supplies	2,700,672.68	129,755.91	2,830,428.59
Other Current and			
Accrued Assets	120,729.65		120,729.65
Total	\$24,264,538.96	(\$2,620,244.09)	\$21,644,294.87
Investments and			
Special Funds	\$12,123,506.70	(\$1,000,000.00)	\$11,123,506.70
Operating Property			
and Equipment	30,031,322.52	1,561,433.96	31,592,756.48
Non-operating Property			
and Equipment	294,515.72		294,515.72
Deferred Charges	2,779,157.96		2,779,157.96
Intangibles			
Property Acquisition			
Adjustment .....	.....	514,536.06	514,536.06
Other Intangible Assets	.....	1,544,274.07	1,544,274.07
Total Assets	\$69,493,041.86	.....	\$69,493,041.86
Liabilities and Net Worth			
Current Liabilities	\$13,010,782.47		\$13,010,782.47
Long-Term Debt	12,000,000.00		12,000,000.00
Deferred Credits	568,282.77		568,282.77
Capital Stock	28,349,676.67		28,349,676.67
Surplus	15,564,299.95		15,564,299.95
Total Liabilities			
and Net Worth..	\$69,493,041.86		\$69,493,041.86

United States of America Civil Aeronautics Board
Washington, D. C.

Docket No. 2839

Adopted by the Civil Aeronautics Board at Its
Office in Washington, D. C., on the 25th
Day of August, 1947.

In the Matter of:

The Application of WESTERN AIR LINES, INC., and UNITED AIR LINES, INC., Under Sections 401, 408 and 412 of the Civil Aeronautics Act of 1938, as Amended, for an Order Approving an Agreement for the Sale of Certain Properties and the Transfer and Amendment of a Certificate of Public Convenience and Necessity.

ORDER

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision which is attached hereto and made a part hereof;

It Is Ordered That:

1. Subject to the provisions of paragraph 4 of this order, the agreement dated March 6, 1947, between Western Air Lines, Inc., and United Air Lines, Inc., be and it hereby is approved;

2. The transfer to United Air Lines, Inc., of the certificate of public convenience and necessity

dated November 11, 1944, issued to Western Air Lines, Inc., pursuant to Order Serial No. 3263, be and it hereby is approved;

3. Within twenty-one days of the date of this order, the amended certificate of public convenience and necessity dated May 19, 1947, issued to United Air Lines, Inc., pursuant to Order Serial No. E-556 shall be further amended to authorize United Air Lines, Inc., to engage in air [1840] transportation of persons, property, and mail between the terminal point Los Angeles, Calif., the intermediate points Las Vegas, Nev., Grand Junction, Colo., Denver, Colo., North Platte, Nebr., Grand Island, Nebr., Lincoln, Nebr., Omaha, Nebr., Des Moines, Iowa, Cedar Rapids, Iowa, Iowa City, Iowa, Moline, Ill., Milwaukee, Wisc., Chicago, Ill., South Bend, Ind., Toledo, Ohio, and (a) beyond Toledo, Ohio, the intermediate points Detroit, Mich., Cleveland, Ohio, Akron, Ohio, Youngstown, Ohio, Allentown, Pa., Philadelphia, Pa., and the co-terminal points New York, N. Y., and Newark, N. J., and (b) beyond Toledo, Ohio, the intermediate points Detroit, Mich., Cleveland, Ohio, Hartford, Conn., and the terminal point Boston, Mass., and (c) beyond Toledo, Ohio, the terminal point Washington, D. C.; subject to a restriction prohibiting United Air Lines, Inc., from engaging in local air transportation between Los Angeles, Calif., and Las Vegas, Nev.; and

4. Upon the payment by United Air Lines, Inc., to Western Air Lines, Inc., of the purchase price of \$3,750,000, United Air Lines, Inc., shall charge to

surplus account the difference between the total purchase price hereby approved and the original cost to Western Air Lines, Inc., of all property transferred, both tangible and intangible, less depreciation on the books of Western Air Lines, Inc., at the time of transfer; Provided, that the amount so charged shall be subject to adjustment by further order of the Board upon determination of reasonable and proper depreciation by Western Air Lines, Inc., as of the time of transfer; United Air Lines, Inc., shall file with the Board within ten days of the date of said payment a statement certifying that said amount has been charged to surplus as herein directed.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary. [1841]

Proof of Service

I hereby certify that on Aug. 26, 1947, this document was:

1. Posted on the official bulletin board.
2. Served on all parties on attached list.
3. Served on all mailing lists.

/s/ C. F. WILLIAMS,
Chief, Docket Section.

Registered:

American Airlines, Inc., Att: C. W. Jacob,
1437 K St., N. W., Wash., D. C.

T. W. A., Att: George H. Clay, 101 W. 11th
St., Kansas City 6, Mo.

Pan American Airways, Inc., Att: Henry J. Friendly, 135 E. 42nd St., New York, N. Y.

Mid-Continent Airlines, Inc., Att: J. W. Miller, 102 E. 9th St., Kansas City, Mo.

Northwest Airlines, Inc., Att: A. E. Floan, 1885 University Ave., St. Paul, Minn.

Minneapolis-St. Paul Airport Commission, c/o Albert Beitel, Morris, KixMiller & Baar, American Security Bldg., Wash., D. C.

Air Lines Pilots Assn., c/o David L. Bencke, 3145 W. 53rd St., Chicago, Ill.

Continental Air Lines, Inc., Att: Robert Purcell, Stapleton Airfield, Denver 7, Colo.

Western Air Lines, Inc., Att: Paul E. Sullivan, 6060 Avion Drive, Los Angeles, Calif.

United Air Lines, Inc., Att: S. P. Martin, 5959 S. Cicero Ave., Chicago 38, Ill.

Glen B. Eastburn, Mgr., Aviation Dept., Los Angeles C. of C., 1151 Broadway, Los Angeles, Calif.

Regular:

J. Francis Reilly, 726 Jackson Place, N. W. Wash., D. C.

Howard C. Westwood, 701 Union Trust Bldg., Wash., D. C.

John W. Cross, Cummings, Stanley, etc., 1625 K St., N. W., Wash., D. C.

Mrs. A. M. Archibald, c/o Pan American Airways, Inc., 815 15th St., N. W., Wash., D. C.

George A. Spater, Chadbourne, Wallace, etc., 25 Broadway, New York, N. Y.

J. Howard Hamstra, c/o Pan American Airways, Inc., 135 E. 42nd St., New York, N. Y.

C. Edward Leasure, 1518 K St., N. W., Wash., D. C.

James K. Crimmins, Chadbourne, Wallace, etc., 25 Broadway, New York, N. Y.

Hugh W. Darling, 737 Pacific Mutual Bldg., Los Angeles, Calif.

Paul M. Godehn, Mayer, Meyer, etc., 231 S. LaSalle St., Chicago, Ill.

S. B. Redmond, Continental Air Lines, Inc., 550 Equitable Bldg., Denver, Colo.

Ronald C. Kinseym, Continental Air Lines, Inc., 224 Shoreham Bldg., Wash., D. C.

Edwin McElwain, 701 Union Trust Bldg., Wash., D. C.

C. E. Fleming, c/o T. W. A., Hangar #2, Washington National Airport, Wash., D. C.

Miss Carlene Roberts, 1437 K St., N. W., Wash., D. C.

Henry P. Bevan, Chadbourne, Wallace, etc., 25 Broadway, New York, N. Y.

J. Stratton, TWA, Hangar #2, Washington National Airport, Wash., D. C.

Elihu Schott, c/o Cleary, Friendly & Cox, 52 Wall St., New York, N. Y.

Philip Schleit, Cummings, Stanley, etc., 1625 K St., N. W., Wash., D. C.

Seth W. Richardson, Bowen Bldg., 815 15th St., N. W., Wash., D. C.

Robert G. Thach, 1518 K St., N. W., Wash., D. C.

Oppenheimer, Hodgson, Brown, Donnelly & Baar, First National Bank Bldg., St. Paul, Minn.

Sheldon Cooper, Cooper, White & Cooper, 701 Crocker Bldg., San Francisco, Calif.

John T. Lorch, Mayer, Meyer, etc., 231 S. La-Salle St., Chicago, Ill. [1842]

Research Department, c/o United Air Lines, Inc., 5959 S. Cicero Ave., Chicago, Ill.

T. C. Drinkwater, c/o Western Air Lines, Inc., 6060 Avion Drive, Los Angeles, Calif.

John H. Pratt, American Security Bldg., Wash., D. C.

John M. Costello, General Counsel, Los Angeles C. of C., 1411 Penna. Ave., N. W., Wash., D. C.

Joseph S. Iseman, Chadbourne, Wallace, etc., 25 Broadway, New York, N. Y.

Fred O. Munch, 3145 W. 63rd St., Chicago, Ill.

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Bulletin Board.

Docket Section.

Stough.

Leasure.

Examiner: Wrenn B-101.

Public Counsel: Highsaw B-38, Kennedy B-38.

Charles A. Ballou B-47.

Special Mail Cards:

Hon. Hugh Butler, 125 Senate Office Bldg., Wash., D. C. [1843]

Before the Civil Aeronautics Board

[Title of Cause.]

PETITION BY THE AIR LINE PILOTS ASSOCIATION FOR A RECONSIDERATION OF THE ORDER OF AUGUST 26, 1947

September 23, 1947

The Air Line Pilots Association respectfully requests this Board grant a rehearing or reconsideration of its decision denying the petition heretofore filed by the Association requiring as a condition of the Western-United Acquisition of Air Carrier Property, Docket 2839, namely, the purchase of Western's Route No. 68 by United Air Lines, the consolidation of Western pilots on the said Route No. 68 into the United seniority list, without prejudice, in accordance with their seniority.

It is respectfully requested that the Board modify its decision in this case so as to require United Air Lines to take into its seniority list of pilots the pilots that were normally required to fly Route No. 68 as operated by Western Air Lines. This request is based upon the fact that the Board was led to believe by Western's president that Western's operations would require all of the personnel on Route No. 68 to operate other routes which in the light of new developments is not true.

The Board based its decision to deny transfer of Western pilots to United on the following which are quoted from pages 23 and 24 of the decision in this case:

I. "Western's president testified that Western had every intention of retaining the 14

flight crews operating on Route No. 68 in the event this transaction is approved and transferring them subject to their seniority."

II. "It is not clear from the testimony that the local organizations of Western and United pilots subscribe to this policy."

III. "This witness testified that Western would need more than 14 crews available from the sale of Route No. 68 in order to operate the Seattle extension and the Mexico City route." [1921]

IV. "The witness also testified that no employee of Western will be released because of this transaction."

V. "The Company will probably need more employees at Portland and Seattle."

VI. "It is clear from the record that Western's pilots will continue to be employed by Western retaining their seniority and other rights."

We have quoted specifically from the decision of this Board and, in a nutshell, it amounts to just one thing—that the Company, under oath has told this Board, and this Board relied on such testimony, that no pilot will lose his position.

As one of the bases of this Petition for Reconsideration, we must state that either the witness was ignorant of the conditions of his own line, or he wilfully suppressed facts that were in his possession in that respect, or, lastly, that conditions have so changed since the hearing in May, 1947, that at the time the decision was rendered by this

Board on August 26, 1947, the evidence pertaining to the consolidation was no longer competent for consideration by this Board. We base this upon the following particulars which will be offered in evidence by witnesses, under oath, when the Board will open this record for that purpose:

The decision of this Board was dated August 26, 1947. Western, through its president, T. C. Drinkwater, and other authorized officials, under oath, told this Board that no flight crews would be released from service. Yet, the moment after the decision was received by Western Air Lines, it posted a letter to all pilots dated September 4, 1947, within less than a week from the date of the decision, from which we quote: [1922]

Interoffice Correspondence
Western Air Lines, Inc.

To: All Pilots,

LA, DV, SL

From: Los Angeles, California.

Date: September 4, 1947.

On September 3, 1947, a decision was reached for the schedules for September 15th thru October 15. The new schedules will require 23 fewer pilots.

Therefore, effective September 19, 1947, the following pilots will be removed from the payroll:

Beach, Peterson, Flynn, Hongola, Sonner, McDougall, Jordan, Babcock, Mundy, Stone, Kennedy, Fitzgerald, Luce, Funkey, Schneider, Jacob-

son, Kettler, Critchell, Taylor, Edgerton, Mefford, Hippe, and Keys.

Beach and Peterson elected to go on furlough rather than transfer to Denver. McLaren elected to go to Denver rather than be furloughed so he and Dutton will take Beach and Peterson's places.

Each of the 23 pilots involved will be paid in full for all vacation time accrued as of September 18, 1947.

All furloughs will be handled in accordance with Western Air Lines Policy on Furloughing of Pilots.

Prior to September 18, 1947, each pilot concerned will receive a letter from the company confirming his status.

Allowance for uniforms will be in accordance with SPI attached. Any pilot bag purchased new from the company since June 1, 1947, may be turned in for a credit of \$22.84 (new price exclusive of tax).

At Los Angeles, articles turned in for credit will be given to Rhea Wineland, Stock Room Office, 2nd Floor Hangar Bldg., right of main entrance. She will make out Form 82, Stores Credit slip, giving one copy to the pilot. This copy is then to be taken to Mr. Kramber, Accounts Payable, same floor of the Hangar Bldg., and a check will be issued at that time.

In Denver, articles turned in for credit will be given to Barney Foster who will send a teletype to Mr. Kramber, Accounts Payable, Los Angeles, requesting issuance of a check to cover.

Cap emblems, wings, tool kits, oxygen masks, and cockpit keys must also be turned in to Rhea Wine-land at Los Angeles; Barney Foster at Denver.

All manuals including Jeppesen Range Book must be returned to the Ground School [1923] Office.

Need more be said as to the letter of September 4, when tested against the accuracy of Mr. Drinkwater's testimony that Western presented before this Board, that either this Board was imposed upon by Western, or that it did not know what it was talking about when the testimony was given, or, to be charitable, conditions have changed between May and September so that when they were testifying in May, they could not project what would take place in September.

In exploring further into the accuracy of the testimony, let us take the Board's decision, based on the testimony of Mr. T. C. Drinkwater and statements of Mr. James Francis Reilly, a United Air Lines lawyer, point by point.

I.

This Board stated:

“Western's president testified that Western had every intention of retaining the 14 flight crews operating on Route No. 68 in the event this transaction is approved and transferring them subject to their seniority.” (Board's Decision, page 23.)

The following is quoted from Pages 106-110 of

Volume I of the testimony of Mr. Drinkwater before the Board on May 20, 1947:

Q. "When you say there that you intend to absorb substantially all of the personnel, I just wondered why the qualification?"

A. "Of substantially?"

Q. "Yes."

A. "Because we have too many people in most places in Western Airlines, and we are trying to reduce our overhead, and reduce the number of employees wherever we can. I did not want to say that we would absorb them all because as we get further into the situation, we may find we have too many folks, but generally speaking we know we will need at least 14 flight crews to fly between San Francisco and Seattle, to say nothing of Mexico City. We know we will need larger station complement at Portland, for instance, than we have at Grand Junction, and we know we will need station personnel at Seattle, in number and experience and classifications which will certainly be analogous to our present personnel in Denver." [1924]

Q. "You estimate what percentage of your personnel will probably be taken over?"

A. "Percentage of what personnel?"

Q. "The personnel on route 68 now."

A. "You mean Denver, Grand Junction and the pilots?"

Q. "Yes."

A. "All of the flight crews,* 100 per cent of the flight crews, and I suppose, well, everybody in

*All underlining is ours.

Grand Junction who wants a job, we are going to give them a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to lease some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Airlines, we would take care of all of these people.”

And exactly one week after the Board's decision, namely, September 4, 1947, Western wrote and published the letter already quoted in this petition on page 3 terminating twenty-three (23) pilots, effective September 19, 1947, just four (4) days after the discontinuance of all Western flights on Route No. 68.

It will be noted again that Western discontinued all flights on Route No. 68 on September 15, 1947.

The normal number of schedules on Route No. 68 has been four (4), requiring the services of thirty (30) pilots and four (4) Douglas DC-4 Skymaster airplanes. This number of pilots does not allow for vacation, sickness, etc., which would require a total of approximately thirty-two (32) pilots to fly Route No. 68 with a normal schedule.

Thirty (30) pilots is the normal number of pilots required to man the Douglas DC-4 Skymasters assigned to Route No. 68. Having this point firmly in mind, together with the testimony of Mr. Drinkwater about there being no loss from employment on the part of the Western pilots, we find that Western sold United outright in the same route sale four (4) Douglas DC-4 Skymasters. [1925]

In other words, how could any company possibly take the position that there would be no loss of pilot jobs or pilot employment rights when they know and are party to the sale of the entire Denver-Los Angeles Division, 878 miles of air route mileage, together with four (4) Douglas Skymaster DC-4 aircraft, the equipment necessary to operate a normal schedule on the route purchased by United.

On July 31, Western was operating four (4) round trips a day on Route No. 68 and on August 1, this was cut to two (2) and the equipment used on the Seattle extension, and now on the 15th when United takes over, they go back with three (3) round trips of passenger planes between Denver and Los Angeles, one cargo schedule, and additional service was the DC-6 schedule flying over Denver to Chicago, which has been in operation since about July 15. United is putting fifteen (15) additional crews to work September 15 on Route No. 68, which brings the total number of pilots on that Denver-Los Angeles route to thirty (30) or slightly more.

So it is a fact that the sale of Western's Route No. 68 and four (4) of its DC-4 Skymasters to United results in a loss of employment to Western pilots.

II.

This Board stated:

“It is not clear from the testimony that the local organizations of Western and United

pilots subscribe to this policy.” (Board’s Decision, page 23.)

Western’s pilots have been so aroused by the misstatements that were made by its president, Mr. Drinkwater, that they have individually signed petitions to have the Board reopen its case and to arrive at a fair decision on the disposition of the pilots. Attached as attachment #1 is a copy of the petitions mentioned which are signed by 137 of the pilots and are available to this Board. [1926]

For purposes of clarification, the governing structure of the Air Line Pilots Association, the Executive Board, represents all of the air line pilots and they are all represented on the Executive Board and the authority of the Board is established in a Convention Resolution from which we quote:

Sec. 1(a). “The Executive Board of the Air Line Pilots Association shall be composed as follows: The pilots on each of the air lines which are represented by the Air Line Pilots Association shall be entitled to one first pilot representative and one copilot representative sitting on the Executive Board filled annually by election within thirty days after the time that the Local Council elections are conducted, and the members of the Executive Board of the Association shall serve until replaced. * * *

Sec. 2(a). “The Executive Board shall have the power and authority to control the Association and its general management and its business affairs,
* * *

and as we all know, the Convention of any organization is the highest governing body and its recommendations and desires are not superseded.

So far as the United and Western Pilots are concerned, the following resolution passed by the Executive Board of the Air Line Pilots Association at its last meeting on May 24, 1947, is quoted:

“Resolved, That in the event of a merger, acquisition, consolidation or any other form of the acquiring by one air line of another air line or a part thereof, that the air line pilots flying on such air line or portions thereof at the time such event occurs are considered as being acquired with the air line or portion thereof and their respective accrued seniority rights remain as their possession and continue to accrue as their possession after such ownership and moreover, that such pilots and copilots flying on such air line at that time cannot be dealt with unfairly and their continued employment with the purchasing company endangered or prejudiced in any manner.

“The number of pilots affected by such event should in no case be larger or smaller than the normal number of pilots used in that operation at the time this event is approved by the C.A.B.”

At the time that Mr. Patterson and Mr. Drinkwater were in Washington preparing the petition to the C.A.B. for the transfer or sale of Route No. 68, A.L.P.A.’s Council No. 16, which [1927] includes Los Angeles based Western Air Lines crews, held their regular monthly meeting and at that time requested Mr. M. A. Wooster, Western’s System Chief Pilot, to contact Mr. Drinkwater by telephone and be sure that an arrangement was

made for the transfer of pilots along with the route and equipment and requested Mr. Wooster to state to Mr. Drinkwater that their reason for doing this was to protect the seniority rights of Western pilots and give him an opportunity to make an equitable arrangement for the transfer of Western pilots along with Route No. 68 and equipment, and not make it necessary for the A.L.P.A. to intervene in the case. After the petition was filed and before the hearings were held, Mr. Drinkwater held three separate meetings with the pilots on different days so that everyone would have an opportunity to talk to him and hear his reasons for selling Route No. 68. At these meetings the original request of the Western pilots was repeated and it was repeated again that the pilots did not want to cause any embarrassment to Western or United by becoming an intervener in this case if an agreement could be reached on the matter. At none of these meetings did Mr. Drinkwater go further than to state that if United Air Lines was willing to take the personnel he would be glad to assist in the arrangements and this attitude still remains.

III.

This Board stated:

“This witness testified that Western would need more than 14 crews available from the sale of Route No. 68 in order to operate the Seattle extension and the Mexico City route.”

(Board's Decision, page 23.)

Again we quote from Pages 106-110 of Volume I

of Mr. Drinkwater's testimony, May 20, [1928] 1947.

"Q. You estimate what percentages of your personnel will probably be taken over?

"A. Percentage of what personnel?

"Q. The personnel on route 68 now.

"A. You mean Denver, Grand Junction and the pilots?

"Q. Yes.

"A. All of the flight crews, 100 per cent of the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, we are going to give them a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Airlines, we would take care of all of these people.

"Q. This may seem repetitious in view of what has been brought out, but what now is your position regarding the pilots on this division?

"A. As this statement here reads, Mr. Munch, we have every intention of keeping every one of the 14 flight crews presently operated on route 68 in the event the Board approves this transaction, and transferring them, subject to their seniority list and their rights to bid, to the extended operation of route 63, San Francisco-Portland-Seattle.

"I have had a series of meetings with all of our pilots, three different meetings, in order to meet with everybody in the flight department, and have

gone over this whole thing carefully with them, and explained that if the Board granted our extension of route 63 to Seattle, that was our intention.

“There was no question raised about that program in the event that the Board granted that extension.

“The Board yesterday did grant it, so I assume that takes care of your question.

“Q. In other words, there are more or less guarantees?

“A. That is true, and as a matter of fact, we will need more flight crews than the 14.”

This testimony by Mr. Drinkwater, under oath, made at the C.A.B. hearings regarding this matter, is not borne out, for he removed from the pay roll twenty-three (23) pilots and we see the reason why after studying the flight schedules for the month of July and September 15, 1947. In July, thirty (30) pilots were scheduled on the Los Angeles-Denver route and [1929] twenty-eight (28) pilots on the Los Angeles-San Francisco route, making a total of fifty-eight (58) pilots. Now on September 15, 1947, after selling the four (4) airplanes, twenty (20) pilots are being scheduled on the Los Angeles-San Francisco route and eighteen (18) on the San Francisco-Seattle extension with no pilots on Los Angeles-Denver, Route No. 68. The new total is thirty-eight (38) which means that twenty (20) fewer pilots were being employed on the Los Angeles-Seattle route on September 15 than were on the Los Angeles-Denver and Los Angeles-San

Francisco routes in July due to the sale of airplanes.

In addition, the Mexico City route is not in operation, no one knows when it will be operated and Western does not own the airplanes with which to fly it.

IV.

This Board stated:

“The witness also testified that no employee of Western will be released because of this transaction.” (Board’s Decision, page 23.)

We quote from Pages 106-110 of Volume I of the testimony of Mr. Drinkwater, May 20, 1947.

“Q. You estimate what percentage of your personnel will probably be taken over?

“A. Percentage of what personnel?

“Q. The personnel on route 68 now.

“A. You mean Denver, Grand Junction and the pilots?

“Q. Yes.

“A. All of the flight crews, 100 per cent of the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, we are going to give them a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Airlines, we would take care of all of these people.

“Q. With respect to any personnel that was dropped as the result of the route sale, you don’t

think the board should put any restrictions on that, but you would accept them if any conditions were put in? [1930]

“A. Well, it depends on what they were, but the question is entirely academic because there are not going to be any personnel dropped as the result of route sale. There may be some dropped because they are incompetent, or we have too many folks, but not any dropped because of the route sale.”

The termination of Western pilots has been covered in paragraphs I and III. In addition to pilots losing their jobs, 14 Western stewardesses were also terminated on or about September 19, 1947. Ground personnel at Grand Junction and Denver who were employed on Route No. 68 have been terminated in an unknown percentage; it is believed to be very close to 100 per cent.

V.

This Board stated:

“The Company will probably need more employees at Portland and Seattle.” (Board’s Decision, page 23.)

Again we quote from Pages 106-110 of Volume I of the testimony of Mr. Drinkwater, May 20, 1947.

“Q. If you are unable to absorb any of the personnel who might be left jobless as the result of this sale, do you have any plans with respect to taking care of that personnel?

“A. Well, there won’t be any. The last question covers that.

“Q. Well, you have no plans, then, because you don’t contemplate any?

“A. That is right. As a matter of fact, we will need more people probably. I am sure we will need more people. We will need more people to staff up in Portland and Seattle than we presently have in Denver and Grand Junction, let us put it that way.”

As to the numbers of Western personnel in Portland and Seattle, no operating personnel, with the exception of the dispatchers are in either of these cities. The operation and maintenance of Western’s equipment at Seattle and Portland is performed entirely under a contractual arrangement with Northwest Airlines.

VI.

This Board stated.

“It is clear from the record that Western’s pilots will continue to be employed by Western, retaining their seniority and other rights.”

(Board’s Decision, page 24.) [1931]

We quote from Pages 165-168 of Volume I of the testimony of Mr. Reilly, June 30, 1947.

“Mr. Branch: Would you say that a pilot located there, who has lived at Colorado Junction or whatever it is, at some point on this route, wants to stay there and another carrier acquires the route, and takes over everything, that his previous employer had, that he doesn’t have some right to consideration under the new management?

“Mr. Reilly: I sure do.

“Mr. Branch: You say he has to get his interest protected by his old employer and maybe leave his route and his home and go somewhere else?

“Mr. Reilly: I certainly do think that he is it. If he is going to be without a job, or without employment, or was going to suffer in seniority on the route which he left, or the route that the company who operated the route previously. But no one of these pilots is going to lose a job. If they want to bid 63 and I assume they are the top seniority pilots or they wouldn't be operating 68—that they would bid on that route.”

It has already been shown that Western, eager to conclude this sale, has lead the Board into this erroneous conclusion.

On Pages 165-168, Volume I of Mr. Reilly's argument, June 30, 1947, Mr. Reilly had the following to say:

“It seems to me that what the answer is, as a practical matter, is that the juniors in seniority back of these fellows on route 68 want to move up 14 points. I don't blame them for that. But I think you have a balance there.

“It seems to me it will probably work out. It all depends. Let us assume, Mr. Branch, that we could handle, that we have room to place in our organization maybe for one or two of these pilots; if there was an invalid in the family, or something like that, we could work something out.”

In reply, Mr. Branch made the following observation:

"If I am correct in this, Mr. Reilly, we have always sought to have that rather difficult problem taken care of before we render a final decision."

In Mr. Branch's statement it reflected the well preceded manner in which problems of this character have been worked out in the past. Mr. Reilly's answer to Mr. Branch was:

"I think you are correct. But all of those cases involve the taking over of whole companies. It did not involve the mere taking over of a segment of a route of the system of the carrier from whom the route is being acquired." [1932]

Mr. Reilly chooses to term Route No. 68, 878 miles of air route and a sizeable part of the entire Western system, merely as a segment of a route and seeks to use this to differentiate between the manner and method of solving the pilot personnel problem by belittling it and avoiding it. This does not in any way meet or solve the problems involved.

Let us pursue this thought a few steps further in a logical and common sense manner. All air lines are made up of so-called segments, in fact, the larger air lines in this country are, for the most part, made up of a number of segments, some of them many. In all such instances, since the air line pilots have been effectively organized and capable of self-representation, the pilots went with the acquisition or the acquiring of the various parts that make up most of our present air lines.

Now let us take the same procedure in reverse. Here we have a case of an air line that appears as being disintegrated by sale of various segments.

Route No. 68 has already been sold and the Western pilots have been deprived of their positions and seniority in the sale.

Carrying this line of procedure a step further we again go to the decision on page 12 and find the following:

“In this connection, the president of the United stated that United would be willing to purchase route No. 35 at a price ‘set by the Board.’ ”

This indicates the sale of another segment of Western's property. What is to happen to the pilots on Route No. 35? Carrying this thought to its logical conclusion, there is nothing to prevent the entire line from being sold piece by piece which presents the question: “What about the employment rights and seniority of the Western pilots?” If the policy that has been initiated on Western is carried forward, it will mean that air line property can change hands completely and the pilots on such air line, familiar with the route through long years of experience and making their homes at the division points and taking their place in the economical structure of [1933] our country, have lost completely their employment and all rights relating thereto.

The Air Line Pilots Association again reiterates its original position as included in the decision:

“* * * that the pilots on the Denver-Los Angeles division should be taken over by United and given full employment and seniority rights without prejudices.”

Wherever there is the sale, acquisition or taking over of any air line by another air line in part or in its entirety, this policy must be followed or confusion, injustice, and labor trouble will result and conditions created that cannot possibly be in the public interest. The air line pilots, or any other employees for that matter, must not be permitted to become the pawns in air line property purchased, or acquiring of such property, which is sure to become an actuality unless the recommendations, well preceded in railroad and other modes of transportation as is pointed out in the original Petition of Intervention of the Air Line Pilots Association, in this case, are followed.

It is a well considered opinion of the Air Line Pilots Association that certain witnesses in this case inadvertently or otherwise misadvised the Board as to the true circumstances involved in the purchase of Route No. 68 by United Air Lines from Western Air Lines, and that this Board is entitled to know the truth and the whole truth about all the conditions, happenings and circumstances involved in this purchase so that they will be in a position to modify the pilots' part of their decision in this case to bring it in line with precedent and in accordance with the evidence and facts that actually exist.

The Air Line Pilots Association is prepared to offer witnesses who will substantiate each and every allegation made in this petition. We believe that a reargument and reconsideration will demonstrate the iniquity of the companies' position, and that justice requires that this Board should not depart from well established principles of approving a sale of whole or [1934] part of an air line without adequately protecting the pilots.

Respectfully Submitted,

/s/ DAVID L. BEHNCKE,

President, Air Line Pilots Association, International. [1935]

Verification

New York, N. Y.—ss.

David L. Behncke, being duly sworn, deposes and says: that he is the President of the Air Line Pilots Association, International, and has specific authority to submit this petition on behalf of the Association; that he has read and is familiar with the contents of the foregoing petition for reconsideration; that he intends and desires that in granting or denying said petition the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that, to the best of his information and belief, every statement contained

in the said petition is true and that no such statement is misleading.

/s/ DAVID L. BEHNCKE.

Subscribed and sworn to before me this 23rd day of September, 1947.

.....,
Notary Public.

Certificate of Service

It Is Hereby Certified that a copy of the foregoing petition for reconsideration has this day been served upon each party to the above-entitled proceeding.

Dated at New York, N. Y., this 23rd day of September, 1947.

/s/ DAVID L. BEHNCKE,

President, Air Line Pilots Association, International. [1936]

Attachment #1

Petition of Western Air Lines Pilots and Copilots in the matter of "Western-United, Acquisition of Air Carrier Property."

Whereas the Civil Aeronautics Board in Docket No. 2839 approved of a proposed acquisition of property and business of Western Air Lines, Inc., to United Air Lines, Inc.

Whereas such acquisition did not approve as a condition of such acquisition the Western Air Lines

Pilots and Copilots on the Denver-Los Angeles Division which condition was urged by the Air Line Pilots Association as intervener.

Whereas the Board states "It is not clear from the testimony that the local organizations of Western and United Pilots subscribe to this policy."

Whereas contrary to testimony of witnesses in this case (Docket No. 2839), and as a result of this transaction 30 pilots are displaced, 23 pilots are being furloughed, 12 pilots are being demoted from Reserve Captain to Copilots positions, 23% of scheduled routes formerly flown is reduced, and as 4 Douglas DC-4 type aircraft were sold as a part of Route No. 68, I hereby protest the approval of carrier parties without the Western Air Lines Pilots on the said Denver-Los Angeles Division be taken over and given full employment and seniority rights without prejudices by the said purchasing company.

Signed.....,

(Pilot or Copilot.)

Council No..... Western Air Lines, Inc.

Received September 24, 1947. [1937]

United States of America, Civil Aeronautics Board
[Title of Cause.]

PETITION FOR LEAVE TO INTERVENE

The Airline Mechanics Division, UAW-CIO, hereby moves for leave to intervene in the above-captioned proceeding, pursuant to the Regulations of the Civil Aeronautics Board, Serial No. 374, Section 285.6 (b):

1. Petitioner and Western Air Lines, Inc., are the parties to a current labor agreement executed January 1, 1947, covering the class or craft of Air-line Mechanics employed by Western Air Lines, Inc.

2. Petitioner has a substantial interest in the subject matter of the above proceeding by reason of its status as the collective bargaining agent for the ground personnel of Western Air Lines, Inc.

3. Petitioner asserts that it will be bound by the order entered and/or to be entered by the Board in the above-captioned proceeding in such manner as it may affect the rights and privileges of the employees of Western Air Lines, Inc., who are covered by the labor agreement hereinbefore mentioned.

4. Petitioner alleges that as collective bargaining agent for the employees of Western Air Lines, Inc., aforementioned, it has a property and financial interest in the above-captioned proceedings which has not been adequately represented by existing parties to the proceeding.

5. Petitioner alleges that it did not move to intervene within the time required by the Regulations of the Civil Aeronautics Board, Serial No. 374, Section 285.6 (2) for the reason that it had been apprised prior to the commencement of the above-captioned proceedings that Western Air Lines, Inc., did not seek any action which would affect the rights and privileges [1939] of the employees covered by the labor agreement hereinabove mentioned. Subsequent to the entry of the Board's order, which was entered on August 26, 1947, petitioner was advised, contrary to the information

which previously came to the attention of petitioner concerning the employees covered by its labor agreement with Western Air Lines, Inc., and contrary to the position taken by Western Air Lines, Inc., during the course of the hearings in the above-captioned proceeding, that Western Air Lines, Inc., had taken affirmative action concerning the rights and privileges of employees covered by the labor contract hereinbefore mentioned, in discharging a substantial number of said employees.

6. Petitioner makes this application so that it may be afforded an opportunity to assert its contentions with the respect to the application made in this proceeding, insofar as it may affect the rights and privileges of the employees covered by the labor agreement hereinbefore mentioned, and insofar as said application may affect and be consistent with the public interest.

Wherefore, Petitioner herein moves for leave to intervene in the above proceeding for the purpose of presenting to the Board such applications and evidence as in the circumstances may be deemed mete.

/s/ DOMINIC Di GALBO,

International Representative
UAW-CIO. [1940]

VERIFICATION

State of New Jersey,
County of Essex—ss

Dominic Di Galbo, being duly sworn, deposes and says: that he is the International Representative of the United Automobile Workers of America, UAW-

CIO, and has specific authority to submit this petition on behalf of the Airline Mechanics Division, UAW-CIO; that he has read and is familiar with the contents of the foregoing petition for leave to intervene; that he intends and desires that in granting or denying said petition the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that, to the best of his information and belief, every statement contained in the said petition is true and that no such statement is misleading.

/s/ DOMINIC Di GALBO.

Subscribed and sworn to before me this 23rd day of September, 1947.

/s/ SIDNEY REITARAN,
An Attorney at Law of
New Jersey.

Certificate of Service

It Is Hereby Certified that a copy of the foregoing petition for leave to intervene has this day been served upon each party to the above-entitled proceeding.

Dated at Newark, New Jersey, this 23rd day of September, 1947.

/s/ DOMINIC Di GALBO,
International Representative,
UAW-CIO.

Received September 25, 1947. [1941]

United States of America,
Civil Aeronautics Board

[Title of Cause.]

PETITION BY AIRLINE MECHANICS DIVISION, UAW - CIO, FOR RECONSIDERATION OF THE ORDER OF AUGUST 26, 1947, AND REHEARING

Application is hereby made by the Airline Mechanics Division, UAW-CIO, to this Board, to grant a rehearing and/or reconsideration of its decision dated August 26, 1947, approving the agreement of sale in the above-captioned matter, for the reasons and arguments herein set forth.

The Board's decision, pages 23 and 24, recites portions of the testimony and its conclusions from the testimony which guided the Board in making its decision. It is respectfully submitted that this testimony is not supported by the present state of the facts and therefore the inclusions drawn therefrom are erroneous and presently inapplicable. We quote from the Board decision:

“The witness¹ also testified that no employee of Western would be released because of this transaction* and that every competent employee in the employment of the company at Grand Junction and Denver will continue with Western, that the company will probably need more employees at Portland and Seattle than the present employees at Denver and Grand

¹The witness referred to is Western's president, T. C. Drinkwater.

*Underscoring supplied.

Junction and that Western will pay the employees' moving expenses . . . ”

“It is clear from the record that Western's pilots will continue to be employed by Western retaining their seniority and other rights and that every other competent employee on Route No. 68* who would be retained by the company if this transaction had not been proposed will continue to be employed by the company with full rights . . . ” [1943]

“Therefore, since there is nothing that would indicate that any of the rights of Western's present employees on Route No. 68 will be prejudiced by the acquisition and operation of that route by United, there appears to be no reason for any condition of that nature by the Airline Pilots Association.”²

This application is hereby made to vacate and/or modify the Order of the Board for the reasons that:

I. New matter has arisen since the hearing which, with due diligence, the petitioner could not have known or discovered prior to the time of hearing; and

II. Compliance with the Board's Order would be inconsistent with the public interest; violative of a current labor agreement between Western Air Lines, Inc., and Petitioner; and prejudicial to the

*Underscoring supplied.

²The condition urged by the Airline Pilots Association was that the pilots of Western on Route No. 68 be consolidated into United's seniority lists.

rights and privileges of Western's ground personnel of its Route No. 88.

I. New Matter Has Arisen Since the Hearing Which With Due Diligence the Petitioner Could Not Have Known or Discovered Prior to the Time of Hearing.

During the course of the hearings in this matter Mr. T. C. Drinkwater, president of Western, testified that Western had every intention of retaining its personnel on Route No. 68, including Denver and Grand Junction. The following is quoted from pages 106-110 of Volume One of the testimony of Mr. Drinkwater before the Board on May 20, 1947:

Q. "When you say there that you intend to absorb substantially all of the personnel, I just wondered why the qualification."

A. "Of substantially?"

Q. "Yes."

A. "Because we have too many people in most places in Western Air Lines, and we are trying to reduce our overhead, and want to say that we would absorb them all because as we get further into the situation, we may find we have too many folks, but generally speaking we know we will need at least fourteen (14) flight crews to fly between San Francisco and Seattle, to say nothing of Mexico City. We know we will need larger station complement at Portland, for instance, than we have at Grand Junction, and we know we will need station personnel at Seattle, in number and experience and classifications which will certainly be analogous to our present personnel in Denver."

(2) The condition urged by the Airline Pilots Association was that the pilots of Western on Route No. 68 be consolidated into United's seniority [1944] lists.

Q. "You estimate what percentage of your personnel will probably be taken over?"

A. "Percentage of what personnel?"

Q. "The personnel on route No. 68 now."

A. "You mean Denver, Grand Junction and the pilots?"

Q. "Yes."

A. "All of the flight crews, 100 per cent of the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, we are going to give them a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Air Lines, of course, but aside from the general reduction in personnel which is still going on in Western Air Lines, we would take care of all of these people."

Q. "With respect to any personnel that was dropped as the result of the route sale, you don't think the Board should put any restrictions on that, but you would accept them if any conditions were put in?"

A. "Well, it depends on what they were, but the question is entirely academic because there are not going to be any personnel dropped as the result of the route sale.* There may be some dropped because they are incompetent or we have too many

*Underscoring supplied.

folks but not any dropped because of the route sale.”

Q. “If you are unable to absorb any of the personnel who might be left jobless as the result of this sale, do you have any plans with respect to taking care of that personnel?”

A. “Well, there won’t be any. The last question covers that.”

Q. “Well, you have no plans, then, because you don’t contemplate any?”

A. “That is right. As a matter of fact, we will need more people, probably. I am sure we will need more people. We will need more people to staff up in Portland and Seattle than we presently have in Denver and Grand Junction, let us put it that way.”

Approximately one week after the Board’s decision, Western commenced termination of its ground personnel as a result of the sale of Route No. 68 so that at the present time all of the ground personnel required to maintain Route No. 68, to wit: 43, have been laid off.

In the above testimony by Drinkwater, he assured the Board that with the extended operation of Route No. 63, San Francisco—Portland—Seattle, Western would have ample employment for all of its personnel formerly operating on Route No. 68. It should be noted that none of Route No. 68’s personnel have [1945] been absorbed in the extension of Route No. 63 and that Western’s maintenance at Portland and Seattle is being performed by other airline personnel. Since the date of the Board’s

order, United has hired approximately three (3) Western ground personnel.

It is apparent from the foregoing that the evidence submitted to the Board, and upon which this Board rendered its decision, was either incomplete, inaccurate, intentionally misleading, or that since the date of the last hearing and/or the rendering of the Board's decision, the facts and circumstances have so changed that the evidence relating to the disposition of the personnel is no longer supported by the facts.

Prior to the hearings in this proceeding petitioner was apprised of Western's position as outlined in its testimony before this Board, which position was consistent with petitioner's thinking concerning Western's personnel on Route No. 68. This obviated any necessity for petitioner's appearing in the proceeding as an intervenor to seek to establish any conditions upon which the sale should be approved. Since the close of the hearing all of the forty-three (43) ground personnel employed by Western on Route No. 48, and members of petitioner, have been terminated.

II. Compliance With the Board's Order Would Be Inconsistent With the Public Interest, Violative of the Existing Labor Agreement Between Western and Petitioner and Prejudicial to the Rights of Western's Employees on Route No. 68.

It should be noted that Route No. 68 was a very important adjunct of Western's operations. Reference is made in the Board's decision to the possibility of the purchase by United of Route No. 35

now operated by Western. It may be Western's intent to ultimately seek a consummation of the sale of Route No. 35. If the Board fails to reconsider its decision insofar as it affects the disposition of the personnel of Route No. 68, in light of the recently discovered evidence, which may represent an original intention of Western, a dangerous precedent will be established. If this decision is not modified and [1946] Western should subsequently pursue the possibility of the sale of its Route No. 35 and advise the Board that it intends to absorb the personnel on Route No. 35, whereas in fact it has no such intention, the Board would be confronted anew with the present problem. Unless this scheme on the part of Western is "nipped in the bud," what will become of the seniority and employment rights of the ground personnel presently employed by Western?

Section 32 of the labor agreement between Western and Petitioner provides that where a reduction in force shall take place, an employee may exercise his seniority at his own station or may replace the employees with the less system seniority in his own classification or any lower classification.

Western's termination of the ground personnel formerly assigned to Route No. 68 and contrary to the position taken by Western at the hearings in this matter, has given rise to a violation of the contract terms mentioned above. If the parties execute compliance with the Board's Order it may be necessary to institute a series of law suits to enforce the provisions of the agreement between West-

ern and Petitioner, with considerable inconvenience to the parties to the agreement.

It is well known in the air transportation industry that employee's seniority rights and privileges and other indicia of security have been won after long and protracted bargaining discussions. These rights and privileges are not to be lightly cast aside by parties to any proceeding in their desire to achieve their personal objective. Casual disregard of the obligations necessary to maintain the high level of employment standards, regardless of the objective, may result in a serious labor dispute which would be harmful to the uninterrupted flow of air traffic. Such conduct should not be permitted as inconsistent with the public interest.

Western's conduct since the entry of the Board's order herein has been seriously prejudicial to the rights of its employees, formerly employed on Route No. 68. The ground personnel, in addition to a substantial number of the pilots have been deprived of their economic security. This does not only [1947] affect the lives of the men employed, but also the welfare and safety of their families. All of this because of Western's failure to abide by its position stated under oath to this Board. To permit this condition to remain unmodified would be highly prejudicial to the welfare of all ground personnel in the airline industry, and disruptive of peaceful and satisfactory labor relations.

Conclusion

It is respectfully requested that the Board modify its decision in this proceeding to require as a condi-

tion of the sale that Western Air Lines, Inc., either retain, with full seniority and other rights and privileges, the ground personnel employed on Route No. 68, previously operated by Western Air Lines, Inc.; or in the alternative require United Air Lines, Inc., to take into its seniority list of ground personnel, the ground personnel formerly employed by Western Air Lines, in its operation of Route No. 68.

Petitioner further urges that a re-hearing be ordered in this matter to enable it to produce witnesses to testify as to the matters and things herein set forth.

/s/ DOMINIC Di GALBO,
International Representative,
UAW-CIO. [1948]

Verification

State of New Jersey,
County of Essex—ss.

Dominic Di Galbo, being duly sworn, deposes and says: that he is the International Representative of the United Automobile Workers of America, UAW-CIO, and has specific authority to submit this petition on behalf of the Airline Mechanics Division, UAW-CIO; that he has read and is familiar with the contents of the foregoing petition for reconsideration and/or re-hearing; that he intends and desires that in granting or denying said petition the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that, to the best of his infor-

mation and belief, every statement contained in said petition is true and that no such statement is misleading.

/s/ DOMINIC Di GALBO.

Subscribed and sworn to before me this 23rd day of September, 1947.

/s/ SIDNEY RUTMAN,

An Attorney at Law of
New Jersey.

Certificate of Service

It Is Hereby Certificated that a copy of the foregoing petition for reconsideration and/or rehearing has this day been served upon each party to the above-entitled proceeding.

Dated at Newark, New Jersey, this 23rd day of September, 1947.

/s/ DOMINIC Di GALBO,

International Representative,
UAW-CIO.

Received September 25, 1947. [1949]

United States of America,
Civil Aeronautics Board

[Title of Cause.]

ANSWER OF PUBLIC COUNSEL TO THE
PETITIONS OF LABOR ORGANIZA-
TIONS FOR RECONSIDERATION OF
THE ORDER OF AUGUST 26, 1947

IV.

Recommendations of Public Counsel

It would appear that the parties have made no serious effort to work out by voluntary collective bargaining any provisions for the protection of employees displaced as a result of the transfer. It is recommended therefore that before the Board passes upon the petitions for reconsideration it request the parties—Western, United, ALPA, the Brotherhood, UAW, and any other representatives of the employees—to endeavor to work out for presentation to the Board and incorporation in an amended order an arrangement for the protection of Western's displaced employees.

If the parties fail to reach a voluntary agreement, it is recommended that the Board order a further hearing on the subject of what conditions, if any, should be imposed for the protection of such displaced employees.

September 29, 1947.

Respectfully submitted,

/s/ JAMES L. HIGHS AW, JR.,

/s/ WILLIAM F. KENNEDY,

Public Counsel.

Received September 29, 1947. [1956]

United States of America,
Civil Aeronautics Board

[Title of Cause.]

PETITION FOR STAY OF BOARD ORDER

On August 26, 1947, the Civil Aeronautics Board rendered its decision and order in the above-captioned matter, approving the agreement of sale dated March 6, 1947, between Western Air Lines, Inc., and United Air Lines, Inc.

On September 23, 1947, petitioner herein, Air Line Mechanics Division, UAW-CIO, made application for leave to intervene in the above-captioned proceedings, and further made application by petition to this Board for reconsideration and rehearing with respect to its order aforementioned.

On September 29, 1947, the Public Counsel rendered his answer to the petition for reconsideration and rehearing in which said Public Counsel recommended that before the Board pass upon the petition, the parties endeavor to work out for presentation to the Board and incorporation in an amended order, an arrangement for the protection of Western's displaced employees.

Petitioner has on this date notified Western Air Lines, Inc., and United Air Lines, Inc., with copies to Air Line Pilots Association and Brotherhood of Railway and Steamship Clerks of its desire to confer with them concerning an arrangement for the protection of Western's displaced employees, copy of which notice is annexed hereto and made a part hereof,

Wherefore, petitioner prays:

1. That this Board shall grant a stay of the

effectiveness of its order of August 26, 1947, pending the outcome of petitioner's [1959] request for a conference with Western Air Lines, Inc., and United Air Lines, Inc., and the results thereof.

2. That this Board grant such other relief as in the circumstances may be deemed mete.

/s/ DOMINIC Di GALBO,
International Representative,
UAW-CIO. [1960]

Notice

To: Western Air Lines, Inc.
United Air Lines, Inc.

Re: Western-United, Docket No. 2839.

In conformance with the Recommendations of the Public Counsel of the Civil Aeronautics Board, we hereby request a conference for the purpose of endeavoring to work out for presentation to the Board and incorporation in an amended order an arrangement for the protection of Western's displaced employees. Will you please communicate with our Mr. Gillespie at 5851 Avalon Blvd., Los Angeles 3, Calif., to arrange a mutually convenient time and place.

ISSERMAN & KAPELSOHN,
Counsel to Air Line Mechanics Division, UAW-
CIO, 24 Commerce Street, Newark, N. J.
cc to Air Line Pilots Association, Brotherhood of
Railway and Steamship Clerks.

Received October 3, 1947. [1961]

Before the Civil Aeronautics Board

[Title of Cause.]

MEMORANDUM OF UNITED AIR LINES,
INC., IN REPLY TO THE PETITION OF
AIR LINE PILOTS ASSOCIATION FOR
RECONSIDERATION OF THE BOARD'S
ORDER OF AUGUST 25, 1947

United Air Lines, Inc., requests the Board to deny the petition of the Air Line Pilots Association.

United is informed and believes that no pilot of Western Air Lines, Inc., was furloughed, or his employment terminated, as a result of the acquisition of Route 68 by United from Western.

United is informed and believes that any change in the status of any Western pilot, subsequent to March 6, 1947, was due to circumstances and conditions unrelated to the transaction involved in this proceeding.

Like all other air carriers, Western in recent months has found it necessary to furlough and terminate substantial numbers of employees of all classifications, including pilots. These furloughs and terminations would have been required whether the Board approved or disapproved the joint application of United and Western herein.

United believes that it has a high responsibility to protect the employment status and seniority of its own pilots; and that the [1964] Board should give substantial consideration to the rights of these pilots in its determination of the pending petition of the Air Line Pilots Association.

Like all other air carriers, including Western, United has been forced in recent months to terminate and furlough substantial numbers of its personnel, affecting approximately 2500 employees; 479 of which were on leave of absence or furlough status on September 30, 1947. Of this latter group, 37 are copilots. Due to the normal reduction in schedules during the winter season (including removal of at least one schedule from Route 68), and other factors, United in the very near future will be required to furlough substantial additional employees. It is United's present view that it may have a surplus of approximately 100 pilots at November 15, 1947.

Unquestionably, any order of the Board seeking to require United to absorb any of Western's pilots will affect adversely and seriously the status and seniority of United's pilots; particularly if the pilots absorbed have long tenures of service with Western.

Under the resolution¹ adopted by the Executive Board of the Air Line Pilots Association on May 24, 1947 (after the public hearing was concluded), apparently it is the position of the Association that United should be required to absorb the Western pilots who were flying Route 68 on August 25,

¹"The number of pilots affected by such event should in no case be larger or smaller than the normal number of pilots used in that operation at the time this event is approved by the C.A.B." (Page 7 of petition of Air Line Pilots Association.)

1947, the date on which the Board approved the acquisition of that route by United from Western. Since Western was operating two schedules over Route 68 on that date, United is informed and believes that a maximum of seven crews were employed on that route. Certainly, that would be the maximum number [1965] of pilots which United, under any circumstances, might be asked to absorb; and that number would be reduced by the number of pilots who have accepted employment on other routes of Western, or who have resigned, or who might desire to remain with Western, or who might not desire to be employed by United. In other words, under any circumstances, only fourteen pilots would be involved, and if any of those fourteen who were flying Route 68 on August 25 have accepted assignment on other Western routes, or have resigned from Western, or for any other reason do not desire to be employed by United, the number of pilots, fourteen, would be correspondingly reduced.

All of the equities of the matter, and the inherent rights of United's pilots, militate strongly against the Air Line Pilots Association using this transaction as a device to force United to absorb any of Western's pilots; particularly where the status and seniority of such pilots have not been affected adversely as a result of United's acquisition of Route 68.

United concedes that the rights of employees are an element of the public interest to be considered in a transaction such as before the Board in this proceeding; but it is only one of the elements to

be considered and weighed with all of the other public interest factors involved, including the present "shake-down," dynamic, evolutionary economic transition period through which the entire air transport industry is passing. Furthermore, the rights of United's personnel are as much an element of the public interest as the rights of the personnel of Western. United contends vigorously that the facts and circumstances in this case do not warrant the prejudice and jeopardy of the rights of United's pilots which would result if the petition of the Air Line Pilots Association were granted in whole or in part. [1966]

Conclusion

The public interest does not require the modification of the Board's order of August 25, 1947, as requested by the Air Line Pilots Association.

The petition of the Air Line Pilots Association should be denied.

Respectfully submitted,

/s/ JAMES FRANCIS REILLY,

Attorney for United Air
Lines, Inc.

San Francisco, California, October 6, 1947.

Received October 7, 1947. [1967]

Before the Civil Aeronautics Board

October 6, 1947.

[Title of Cause.]

MEMORANDUM OF UNITED AIR LINES,
INC., IN REPLY AND OPPOSITION TO
PETITIONS OF AIRLINE MECHANICS
DIVISION, UAW-CIO

The Airline Mechanics Division, UAW-CIO, hereinafter referred to as "Mechanics," has filed herein two petitions: (1) for leave to intervene and (2) requesting the Board to reconsider and modify its Order of August 25, 1947.

United Air Lines, Inc., requests the denial of the petition of the Mechanics for leave to intervene on the following grounds:

(a) The time within which such petitions may be filed, under the Board's procedural rules and regulations, expired long before the petition of the Mechanics was filed;

(b) The petition does not set forth sufficient grounds upon which the Board may reasonably permit a waiver of its rules and regulations;

(c) The mechanics had notice of, and full opportunity to participate in, all of the proceedings held in this case; and

(d) The rights of Western's employees, including mechanics, were an issue in this proceeding; and were represented adequately and fully by (1) The Brotherhood of Railway and

Steamship Clerks and (2) Public [1969] Counsel.

In so far as the petition of the Mechanics requesting modification of the Board's Order of August 25, it is United's position that the said petition should be denied.

United is informed and believes that none of the employees of Western referred to in the petition of the Mechanics suffered loss of employment, status or seniority as a result of United acquiring Route 68 from Western; that status of these employees, if affected adversely in recent weeks, had nor has any relation whatsoever to the transaction involved in this proceeding; that Western, like all other air carriers, has been forced to make substantial operating expense reductions in all phases of its operations, resulting in substantial reductions in all classifications of its personnel; and that it was therefore necessary for Western to furlough and terminate some ground personnel, including mechanics, irrespective of the Board's final decision with respect to United's proposed acquisition of Route 68 from Western.

Like Western and all other air carriers, United in recent months has been forced to make substantial reductions in its personnel affecting approximately 2500 employees. As of September 30, United had 479 persons on furlough and/or leave of absence status, including 28 shop mechanics, 2 building maintenance mechanics, 33 line mechanics, 31 Mechanic's helpers, 3 apprentice mechanics, and 1 helper apprentice mechanic. United contends that

the jeopardy and prejudice to these employees which would result if United were asked to absorb any of Western's employees would be adverse to the public interest.

Furthermore, because of the normal reduction in schedules (including removal of at least one schedule from Route 68) in the winter season, and other factors, United, unquestionably, will be forced to terminate and/or furlough additional employees in the immediate future. [1970]

United contends that the rights of its employees are paramount to the rights of Western's employees in this transaction under all consideration of the public interest, particularly since the rights of Western's employees if affected adversely recently were so affected for reasons totally unrelated to the acquisition of Route 68 by United from Western.

Conclusion

The petition of Airline Mechanics Division, UAW-CIO, for leave to intervene should be denied.

The petition of Airline Mechanics Division, UAW-CIO, seeking modification of the Board's Order of August 25, 1947, should be denied in all respects.

Respectfully submitted,

/s/ JAMES FRANCIS REILLY,

Attorney for United Air
Lines, Inc.

Received October 7, 1947. [1971]

Before the Civil Aeronautics Board

October 10, 1947.

[Title of Cause.]

ANSWER OF WESTERN AIR LINES, INC.,
IN OPPOSITION TO THE PETITION OF
AIR LINE PILOTS ASSOCIATION FOR
RECONSIDERATION OF THE BOARD'S
DECISION

Western Air Lines, Inc., opposes the petition of Air Line Pilots Association for reconsideration.

ALPA's petition for leave to intervene, dated March 15, 1947, was granted on April 1, 1947, by Order Serial Number E-409. ALPA was represented at the hearing by counsel, filed a brief with the Board and participated in oral argument. Throughout the proceeding, ALPA was accorded the same rights and privileges as a party and had the opportunity of presenting such evidence and such arguments as it may have deemed necessary or pertinent to refute or counteract the evidence and argument presented by the applicants. [1974]

The record supports the Board's decision, which is responsive to the overall public interest.

No showing has been made by ALPA that the overall public interest would be served by any modification of the decision or by a different decision.

ALPA's petition should be denied.

Respectfully submitted,

GUTHRIE, DARLING &
SHATTUCK,

Attorneys for Western Air
Lines, Inc.

Received October 14, 1947. [1975]

Before the Civil Aeronautics Board

October 10, 1947.

[Title of Cause.]

ANSWER OF WESTERN AIR LINES, INC.,
IN OPPOSITION TO THE PETITIONS
OF AIR LINE MECHANICS DIVISION,
UAW-CIO, FOR LEAVE TO INTERVENE,
FOR RECONSIDERATION AND FOR A
STAY OF THE BOARD'S ORDER

Western Air Lines, Inc., opposes the three separate petitions of Air Lines Mechanics Division, UAW-CIO, for leave to intervene, for reconsideration and for a stay of the Board's order.

The petition for leave to intervene was not filed within the time required by the applicable rules and regulations and good cause has not been shown excusing the default.

Petitioner is not a party entitled to petition for reconsideration. In addition to this procedural defect, the petition fails to show good cause for reconsideration of the decision.

Petitioner is not a party entitled to seek a stay order and has failed to show good cause for a stay order. [1978] In addition, the order having been fully executed, no act remains unperformed which could be the subject of a stay order.

The record supports the Board's decision, which is responsive to the overall public interest.

No showing has been made by Air Line Mechanics Division, UAW-CIO, that the overall public interest

would be served by any modification of the decision or by a different decision.

The three petitions of Air Line Mechanics Division, UAW-CIO, should be denied.

Respectfully submitted,

GUTHRIE, DARLING &
SHATTUCK,

Attorneys for Western Air
Lines, Inc.

Received October 13, 1947. [1979]

Before the Civil Aeronautics Board

October 10, 1947.

[Title of Cause.]

PETITION FOR PERMISSION TO FILE OUT
OF ORDER A REQUEST THAT THE
BOARD RECONSIDER AND MODIFY ITS
ORDER OF AUGUST 25, 1947

Now comes your petitioner, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and respectfully petitions the Board that it be permitted to file Out of Order and request the Board to reconsider and modify its order of August 25, 1947.

I.

In support of its request for permission to file Out of Order your petitioner avers:

For some reason or other, which your petitioner

has no way of ascertaining at this time, it was not served with a copy of the Board's opinion and Order of August 25, 1947, notwithstanding the fact that petitioner had filed a brief on June 19, 1947, in this matter. It was not until several days after the order had been issued that it became indirectly informed of the issuance of the order. Immediately upon receipt of this indirect notice your petitioner promptly requested a copy of the order, which was furnished [1982] by the Public Counsel, same being received in Cincinnati on September 13, 1947.

II.

In support of its request that the Board reconsider and modify its order of August 25, 1947, wherein it approved the transfer of certain operating rights, previously held by Western Air Lines, Inc., to United Air Lines, Inc., but found it unnecessary to include any protective measures for employees of either carrier who are or may be adversely affected by the transfer of said operating rights, your petitioner avers:

As one of the standard railway labor organizations with its principal offices in the city of Cincinnati, Ohio, it represents a substantial number of the employees of the Western Air Lines, Inc.;

Since it filed its petition on June 19, 1947, your petitioner has been certified as the representative, for the purpose of collective bargaining, of the craft or class of clerical, office, stores, fleet, and passenger service employees of the Western Air Lines, Inc. (N.M.B. Certification, Case R-1850, September 9, 1947). As the bargaining representative of such

employees of Western Air Lines, Inc., it now represents 59 employees of the Denver facility of the Western Air Lines, Inc. Prior to the certification in N.M.B. Case R-1850, 37 of the present Denver employees were unrepresented and 22 were represented by the UAW-CIO and came under that organization agreement with the carrier. The latter employees, now represented by petitioner, will continue to be covered by the terms of the UAW-CIO Agreement and entitled to all the rights extended by said Agreement until it [1983] is changed under the procedure of the Railway Labor Act, or until such time as a new working agreement is negotiated between the carrier and the petitioning Brotherhood, covering the craft or class mentioned above.

The statement by Mr. T. C. Drinkwater, President of the Western Airlines (p. 106 of the Transcript), and upon which the Board based its decision of not invoking protective measures (p. 24 of Opinion), to the effect that "substantially all" of the personnel of Route 68 would be absorbed by United after it had acquired the operating rights of Western on Route 68, has proven not to reflect the real situation as it exists at this time. The contrary is true. According to statements now a part of the Record (petition of the Air Line Pilots Association for a Reconsideration of the Order of August 26, 1947), several employees represented by that organization have already been adversely affected as a result of the transfer of the operating rights mentioned herein. It follows, therefore, that if operating employees of said Western Air Lines, Inc.,

have already been adversely affected, divers numbers of employees now represented by your petitioner will be adversely affected as soon as the transfer is fully consummated, since it is hardly conceivable that if operating employees are adversely affected (and said operating employees comprise but a small percentage of the total employees), other than operating employees will not be affected.

III.

Further, the adverse effect to employees of United Air Lines, Inc., or Western Air Lines, Inc., will not be confined solely to the Denver operation, even though the direct changes may be confined to [1984] Denver, for the reason that divers numbers of employees at Denver will be forced to change their places of residence, accept positions paying a lower rate of pay, etc., if the testimony of T. C. Drinkwater (p. 107 of the Transcript) is correct when he said:

“Everybody in Denver who wants a job who is a competent person is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Air Lines, we will take care of all of these people.”

The personnel referred to by Mr. Drinkwater were those located in Denver, Colorado, and Grand Junction, Colorado, and the Air Line Pilots.

Therefore, your petitioner prays that the Board grant its request to file out of order for reasons

stated in paragraph I and that its request that the Board reconsider and modify its order of August 26, 1947, to include the protective features requested by this petitioner in the brief which it filed with the Board on June 19, 1947, be granted. If the Board reassigns this case for further argument your petitioner requests that it be notified of said hearing and be permitted to introduce such testimony as is pertinent to the issues.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES.

By /s/ GEO. M. HARRISON,
Grand President. [1985]

State of California,
County of San Francisco—ss.

George M. Harrison, being first duly sworn upon his oath, deposes and says that he is the Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; that he has read and is familiar with the contents of the foregoing application; that he intends and desires that in granting or denying the relief requested, the Board shall place full and complete reliance on the accuracy of each and every statement contained therein; that he is familiar with the facts set out, and, that to the best of his information and belief, every statement contained in the

foregoing application is true and no statement is misleading.

/s/ GEO. M. HARRISON,
Grand President.

Subscribed and sworn to before me this 10th day
of October, 1947.

[Seal] /s/ MARGARET M. LYNCH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Feb. 10, 1948.

Received October 13, 1947. [1986]

United States of America, Civil Aeronautics Board
Adopted by the Civil Aeronautics Board at Its
Office in Washington, D. C., on the 25th Day
of August, 1948.

[Title of Cause.]

ORDER No. E-1894

The Board having in Order Serial No. E-772, dated August 25, 1947, approved the transfer of Route 68 and certain physical properties by Western Air Lines, Inc., to United Air Lines, Inc.; and

The Board having received a petition for reconsideration from the Air Line Pilots Association, a petition for leave to intervene, a petition for reconsideration and a motion for a stay of the Board's Order Serial No. E-772 from the Airline Mechanics Division, UAW-CIO, and a petition for permission to file a request for reconsideration from the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,

each requesting reconsideration of Order Serial No. E-772 and the modification of said order so as to impose conditions for the protection of employees alleged to have been adversely affected by the transfer of Route 68 and certain physical properties; and [1988]

It Appearing to the Board That:

1. Each of said petitions alleges that employees of Western Air Lines, Inc., have been adversely affected by the transfer of Route 68 and of certain physical properties by Western Air Lines, Inc., to United Air Lines, Inc., approved in Order Serial No. E-772;

2. The Board's original decision denying the requests to impose protective conditions for the benefit of displaced employees of Western Air Lines, Inc., was predicated upon a finding that the employees of Western Air Lines, Inc., would not in fact be adversely affected by the transfer of Route 68 and certain physical properties;

3. The Board in a conference held on December 5, 1947, recommended to Western Air Lines, Inc.; United Air Lines, Inc.; the Air Line Pilots Association; the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the Airline Mechanics Division, UAW-CIO, that an effort be made to work out by voluntary agreement a basis for treatment of employees of Western Air Lines, Inc., alleged to have been adversely affected by the transfer of Route 68 and certain physical properties by Western Air Lines, Inc., to United Air Lines, Inc.;

4. The Board has now been advised by the par-

ties of the failure of efforts to work out such a voluntary agreement;

5. The employees of Western Air Lines, Inc., represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and by the Airline Mechanics Division, UAW-CIO, may have been adversely affected by the transfer of Route 68 and of certain physical properties by Western Air Lines, Inc., to United Air Lines, Inc.; that by reason of this fact, said Brotherhood and the [1989] Airline Mechanics Division, UAW-CIO, have a property or financial interest in this proceeding, that the interests of such employees can be most effectively represented by allowing said Brotherhood and the Airline Mechanics Division, UAW-CIO, to participate as parties in this proceeding, and that participation by said Brotherhood and the Airline Mechanics Division, UAW-CIO, as parties would not unduly broaden the issues or delay the proceeding;

6. The motion for a stay of Order Serial No. E-772 was filed after the transactions approved in said order had been consummated;

It Is Ordered That:

1. This proceeding be and it hereby is reopened to determine:

(i) whether any employees of Western Air Lines, Inc., have been adversely affected as a consequence of the transfer of Route 68, and certain physical properties by Western Air Lines, Inc., to United Air Lines, Inc.; and

(ii) what conditions, if any, for the protec-

tion of employees of Western Air Lines, Inc., who may have been adversely affected should be attached to the Board's approval of said transfer of Route 68 and certain physical properties granted in Order Serial No. E-772, dated August 25, 1947;

2. The issues stated in paragraph 1 of this order be assigned for hearing before an Examiner of the Board at a time and place hereafter to be designated;

3. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the Airline Mechanics Division, UAW-CIO, be and they hereby are made parties to this proceeding; [1990]

4. The motion of the Airline Mechanics Division, UAW-CIO, for a stay of Order Serial No. E-772, be and it hereby is denied.

By the Civil Aeronautics Board:

[Seal] /s/ FRED A. TOOMBS,
 Acting Secretary.

Served August 26, 1948. [1991]

Proof of Service

I hereby certify that on Aug. 26, 1948, this document was served on all parties listed below.

/s/ M. B.,

Service and Mail Clerk.

Registered:

Western Air Lines, Inc.; Att: Paul E. Sullivan, 6060 Avion Drive, Los Angeles, Calif.

United Air Lines, Inc.: Att: S. P. Martin,
5959 S. Cicero Ave., Chicago 38, Ill.

James L. Crawford, Attorney, Brotherhood
of Railway and Steamship Clerks, etc.; Broth-
erhood of Railway Clerks Bldg., Cincinnati,
Ohio.

Airline Mechanics Division, UAW-CIO; Att:
Dominic Di Galbo, International Representa-
tive, Newark, N. J.

Regular:

Hugh W. Darling, 737 Pacific Mutual Bldg.,
Los Angeles, Calif.

Paul M. Godehn, Mayer, Meyer, etc., 231 S.
La Salle St., Chicago, Ill.

J. Francis Reilly, Commonwealth Bldg., 1625
K St., N.W., Wash., D. C.

John T. Lorch, Mayer, Meyer, etc., 231 S. La
Salle St., Chicago, Ill.

D. P. Renda, 6060 Avion Drive, L. A., Calif.

Special Messenger:

Burgess—POD.

Delany—POD.

Hawkins—POD.

Bulletin Board.

Docket Section.

Stough.

Leasure.

Examiner: Wrenn B-101.

Public Counsel: Highsaw B-38, [1987] Ken-
nedy B-38.

United States of America, Civil Aeronautics Board
Washington, D. C.

Docket No. 2839

In the Matter of:

WESTERN-UNITED SALE OF ROUTE No. 68

TRANSCRIPT OF REOPENED HEARING

Monday, November 14, 1949

The above-entitled matter came on for hearing, pursuant to notice, at 10 o'clock a.m., before Thomas L. Wrenn, Examiner.

Appearances:

F. HAROLD BENNETT,
3148 West 63d Street,
Chicago, Ill.,

Representing Air Line Pilots Association.

D. P. RENDA,
6060 Avion Drive,
Los Angeles, Calif.,

Representing Western Air Lines.

JAMES FRANCIS REILLY,
959 South Cicero Avenue,
Chicago 38, Ill.,

Representing United Air Lines.

JAMES L. CRAWFORD,
1015 Vine Street,
Cincinnati, Ohio,

Representing the Brotherhood of Rail-
way Clerks.

WILLIAM F. KENNEDY, and
FREDERICK W. BECHTOLD,
Public Counsel, Civil Aeronautics [2030]
Board.

Proceedings

Examiner Wrenn: Let us proceed, gentlemen.

By order dated August 25, 1948, Serial No. E-1894, the Board reopened Docket No. 2839 for further hearing on two points set forth in the first paragraph of the ordering clause. This time and place has been assigned for further hearing in the proceeding.

I would like for record purposes to have you enter your appearances at this time.

Who appears for Air Line Pilots Association?

Mr. Bennett: F. Harold Bennett.

Examiner Wrenn: Who appears for the Brotherhood of Railway Steamship Clerks?

Mr. Crawford: James L. Crawford.

Examiner Wrenn: Who appears for the U.A.W.-C.I.O.?

(No response.)

Examiner Wrenn: Who appears for Western Air Lines?

Mr. Renda: D. P. Renda.

Examiner Wrenn: Who appears for United Air Lines?

Mr. Reilly: James Francis Reilly.

Examiner Wrenn: Who appears for Council No. 57, United Air Line Pilots?

Mr. Bennett: I am also representing them, Mr. Examiner.

Mr. Reilly: I assume Mr. Bennett will show what authority he has for representing Council 57?

Mr. Bennett: Well, they are here.

Mr. Reilly: That is all right. That is all I want to know. [2032]

Examiner Wrenn: Who appears for Public Counsel?

Mr. Kennedy: William F. Kennedy and Frederick W. Bechtold.

Examiner Wrenn: Are there any matters that should be disposed of before we proceed with the taking of evidence?

Mr. Bennett: The only thing I can think of is if there is some question about my representation of the intervenor as members of the Air Line Pilots Association; as I stated before, the Council representatives are here and if someone desires they may make a statement for the record that the Air Line Pilots Association, as represented by myself, is also representing them.

Examiner Wrenn: It raises a question in my mind as to what purpose they have to intervene here.

Mr. Bennett: As a matter of fact, they are not going to present any evidence.

Mr. Reilly: They have filed a petition for intervention, Mr. Examiner, and the position that they take is different from that of the Air Line Pilots Association in convention assembled. I wondered if counsel had——

Mr. Bennett: When I say I represent them, I represent them only for the purpose of making a statement for the record that they are not going to appear.

Mr. Reilly: We were not served with a copy of it, but I saw a letter in the Docket, and I assume that Mr. McBain will state that you——

Mr. Bennett: The representative of that Council will be here and will make such a statement.

Mr. Reilly: That is all I wanted to know. [2033]

Examiner Wrenn: Who is here representing Council 57?

Mr. McBain: I represent them. My name is Donald C. McBain.

Examiner Wrenn: Mr. Renda.

Mr. Renda: Has the Examiner been advised whether or not the C.I.O. will make an appearance in this case?

Examiner Wrenn: I have not. I have no information at all.

Mr. Renda: I assume, then, when their time comes to present, if they are not here, it will be in order to move that they be disregarded as a party in interest.

Examiner Wrenn: It will be perfectly in order to move that at that time, yes.

Off the record.

(Discussion off the record.)

Examiner Wrenn: All right, gentlemen.

In accordance with the order of procedure announced several days ago, the Air Line Pilots Association may proceed with their case at this time.

Mr. Bennett.

Mr. Bennett: I have prepared an opening statement that I would like to read into the record, if I may.

Examiner Wrenn: All right. Proceed.

Mr. Bennett: The agreement of March 6, 1947, whereby Western Air Lines had sold its Denver-Los Angeles Route 68, and certain physical properties to United Air Lines, was filed before this Board for approval on March 7, 1947. This agreement having made no provision for the protection of the employment and seniority rights of the air line pilot [2034] personnel flying upon said route, the A.L.P.A., as the duly authorized representative of the air line pilots of both Western and United, filed its petition to intervene in the cause, which petition was allowed.

Thereafter, on or about May 20, 1947, a hearing was conducted upon the issues involved and Mr. Terrell C. Drinkwater, President of the Western Air Lines, and the principal witness of that petitioner, testified that no pilot-employee problem existed in the contemplated transfer of the Denver-Los Angeles Route 68 and certain physical properties since Western would certainly need all flight

crews then in its employ and very probably would require additional pilots subsequent to the transfer of said route.

For your better understanding of this testimony, Mr. Examiner, I would like to read the testimony of Mr. Drinkwater at that hearing. It may be found at pages 106 to 110 of Volume I of the transcript of the hearing.

Examiner Wrenn: I have that here before me. That is through 110.

Mr. Bennett: Yes, that is right.

I have taken that portion of the transcript—there are some superfluous language in there, but I have taken from that transcript the questions and answers which bear specifically upon this question. I quote from that transcript——

Mr. Reilly: How long is this going to be, Mr. Examiner?

Examiner Wrenn: That is what I would like to know. I wonder if it is going to be a verbatim recital—— [2035]

Mr. Reilly: We can all read. It looks to me like he has five or six pages to read. If so, I will move to strike it, if he is going to start testifying.

Mr. Bennett: This is my opening statement, Mr. Examiner. I would like very much to have it go into the record so that I have continuity to my thought. I see no objection to my making the statement as I prepared it. I would like to read the excerpts as I have prepared them, into this record as part of my opening statement.

Is there any objection to that?

Examiner Wrenn: There seems to be.

Mr. Bennett: Well, I will listen to the objection.

Examiner Wrenn: Question has been raised as to how much there is there. If you are quoting verbatim the transcript, there is no need to repeat it because we have it in front of us now. I have no disposition whatever to restrain your opening statement. You may make whatever comment you want to on this, so that is perfectly all right. But the question seems to be: Why repeat pages 106 through 110 of the transcript when it is right here in front of us?

Mr. Reilly: Further than that, Mr. Examiner, the petitioner of intervention they filed sets forth their interest, and the Board recognized their interest, and granted their petition to intervene. All this testimony of Mr. Drinkwater was in that, and I don't think we should burden the record with it again.

Mr. Bennett: I think I have a right to make my opening statement. Whether I repeat what Mr. Drinkwater said or not is my prerogative in making my opening statement. I don't [2036] understand my objection except it is to save perhaps 15 cents on the record, and by making the objection the only thing counsel does is add another \$2 to the record——

Mr. Reilly: I will agree to let him proceed if it is only going to save me 15 cents, because as I read here the record costs 30 cents a page, and if he has only half a page I am willing for him to proceed.

Examiner Wrenn: Are you going to quote Mr.

Drinkwater's testimony verbatim as set down here?

Mr. Bennett: That is correct.

Examiner Wrenn: Then why read it? I have it before me.

Mr. Bennett: May I proceed?

Examiner Wrenn: You can proceed with your statement, but I was asking, is your statement going to be a verbatim reading of what Mr. Drinkwater said here?

Mr. Bennett: For a very short portion, that is correct.

Examiner Wrenn: For a very short portion, all right. Go ahead.

Mr. Bennett: May I proceed to read it?

Examiner Wrenn: Go ahead.

Mr. Bennett: I quote from the record:

"Q. When you say there that you intend to absorb substantially all of the personnel, I just wondered why the qualification.

"A. Of substantially?

"Q. Yes.

"A. Because we have too many people in most places in Western Airlines, and we are trying to reduce our overhead, and reduce the number of [2037] employees wherever we can. I did not want to say that we would absorb them all because as we get further into the situation, we may find that we have too many folks, but generally speaking we know we will need at least 14 flight crews to fly between San Francisco and Seattle to say nothing of——"

Mr. Renda: Mr. Examiner, I thought Mr. Ben-

nett represented he was going to quote that verbatim from the transcript. It reads: "We may find we have too many folks, but generally speaking we know we will need"——

I wasn't going to interpose any objection, but I am afraid I am going to interpose an objection now.

Examiner Wrenn: Is this verbatim or not?

Mr. Bennett: I was under the impression that it was verbatim. I will read from the record itself.

Examiner Wrenn: Well, the record is in front of us. Why read it?

Go ahead with your statement. What do you have to say about Mr. Drinkwater saying that? I have no objection to you commenting on that, but now you have here an argument or disagreement as to whether you are quoting the record correctly, or not. As long as we are going to get into this argument, I don't see any point in reading the record when we have it right here in front of us.

Mr. Bennett: Just a minute, sir. I will read one answer that is the most important to us. I quote from page 107 of the record.

Examiner Wrenn: Go ahead. [2038]

Mr. Bennett (Reading):

"Q. You estimate what percentage of your personnel will probably be taken over?

"A. Percentage of what personnel?

"Q. The personnel on Route 68 now.

"A. You mean Denver, Grand Junction and the pilots?

"Q. Yes.

"A. All of the flight crews, 100 per cent of

the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, we are going to give them a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Air Lines, we would take care of all of these people."

On or about June 19, 1947, notwithstanding the assurance of Mr. Drinkwater to the contrary, and being fearful of the results to Western pilots should the sale of Route 68 be approved by the Board without making some provision for the transfer of pilots flying that route to the new owner, A.L.P.A. filed its brief in this cause asking that the approval of the sale of Route 68 and certain physical properties be conditioned upon the pilot-employees of Western normally required to fly the Denver-Los Angeles Route 68 be taken over by the purchasing company, United Air Lines, with full employment and seniority rights and integrated into the [2039] United Pilots' seniority list.

On August 25, 1947, the Board entered its findings and order, Serial E-772, approving the agreement for the sale by Western to United of the Denver-Los Angeles Route 68, together with four DC-4 airplanes. The findings and order of the Board made no provision for the disposition of the pilot personnel who were flying Route 68 for Western, and upon this subject the Board made the fol-

lowing observation—pages 23 and 24 of the order of the Board, Serial E-772.

And I would say at this point, rather than get into the argument I did before in quoting this, I would direct the Examiner's attention to the observations made by the Board in that order with respect to the request of the Air Line Pilots Association to condition the order of sale so as to require United to take into its seniority list that personnel that was flying the route for Western.

Examiner Wrenn: I personally am quite familiar with it, Mr. Bennett, and I am sure the Board is.

Mr. Bennett: The order, as you undoubtedly are aware, and as you say you know, said there was no reason why it should be done in view of Mr. Drinkwater's statement.

From the findings of the Board, above, it becomes obvious that the Board's omission from its order of a provision to protect the employment and seniority rights of the pilot personnel flying Route 68 was based entirely upon the recitations of President Drinkwater of Western Air Lines that all of the pilot-employees would continue to be employed by Western Air Lines, retain their full seniority and other rights, notwithstanding the transfer of the route and certain [2040] physical properties.

Immediately, subsequent to the issuances of the order of the Board on August 25, 1947, approving the sale and transfer of the Denver-Los Angeles Route 68 from Western to United, only nine days later, Western issued its inter-office communication

dated September 4, 1947, whereby twenty-odd pilot-employees were removed from Western's pay roll and there followed almost a complete reshuffling of Western's pilots to different routes on the system and a wholesale demotion and reduction of flying time and night flying with a resultant reduction in pay of the pilots of Western Air Lines.

In view of the conditions above recited, which the sale of Route 68 brought about among the pilot personnel of Western, the A.L.P.A. 19 days thereafter, on September 23, 1947, filed its petition for rehearing and reconsideration of the Board's decision and again requested that the Board's approval of the sale of the Denver-Los Angeles Route 68 from Western to United be conditioned so as to require United to take into its pilot seniority list all the Western pilot personnel that were normally required to fly Route 68 as operated by Western.

In response to the contention of the A.L.P.A. that the representations made at the original hearing of this cause by Mr. Drinkwater, president of Western Air Lines, had been erroneous, misleading and without foundation, and that the sale and transfer of Route 68 had, in fact, worked a tremendous hardship and a very real material loss upon the pilot personnel of Western and that the Board had erred in accepting the erroneous and misleading representations of Mr. [2041] Drinkwater in not conditioning the sale of Route 68 so as to require United to take into its seniority list the pilot personnel normally required to fly Route 68, this Board, on August 25, 1948, entered its order reopening this

cause to determine, as I believe we all understand:

(1) Whether any employees of Western Air Lines have been adversely affected as a consequence of the transfer of Route 68 and certain physical properties by Western Air Lines to United Air Lines, and

(2) What conditions, if any, for the protection of the employees of Western Air Lines who may have been adversely affected should be attached to the——

Mr. Renda: Mr. Examiner, I hate to interrupt, but——

Mr. Bennett: Oh, I don't mind. You may interrupt.

Mr. Renda: I think we are pretty far afield in this opening statement. We are repeating everything that the Board knows, and I am sure the Examiner knows, and that we all know. And I don't think it is going to facilitate this proceeding in any way, and if there is a lot more of it to come I think we ought to put a stop to it now.

Examiner Wrenn: Go ahead, Mr. Bennett.

Mr. Bennett: Thank you.

So far as the Air Line Pilots Association is concerned, these are the chronological happenings in this case to the date of the Prehearing Conference conducted on October 11, 1948, subsequent to the reopening of the matter. At this Prehearing Conference it was determined that the Air Line Pilots Association had the burden of establishing which pilot-employees of Western Air Lines, if any, had been adversely affected as a consequence of the sale

of Route 68. The [2042] Association accepted this challenge of showing the adverse effect which the sale of Route 68 has had upon the Western pilots.

The evidence we will produce will show that in his testimony before the Civil Aeronautics Board on May 20, 1947, Mr. Terrell C. Drinkwater indicated that a minimum of 14 flight crews, or 28 pilots, were on that date operating Route 68. The evidence will further show that a minimum of seven pilots are required to keep a DC-4 airplane in normal operation by an air carrier, and that the 14 flight crews, or 28 pilots, mentioned by Terrell C. Drinkwater was the complement of pilots on Route 68.

Examiner Wrenn: What did you say?

Mr. Bennett: Was the complement of pilots on Route 68 at that time.

Mr. Reilly: At what time?

Mr. Bennett: May 20, 1947.

Examiner Wrenn: All right. Go ahead.

Mr. Bennett: That the 14 flight crews were operating the four DC-4 airplanes on Route 68.

The evidence will further show that for a long period of time no airplanes were acquired by Western Air Lines, or put into operation by that company, to replace the four DC-4's transferred from Western to United with Route 68. It therefore becomes only a matter of mathematics to determine that the sale of Route 68 and the four airplanes reduced the number of pilots which Western Air Lines would otherwise have required by not less than 28.

In addition to this mathematical certainty of the [2043] adverse effect which the sale of Route 68 had upon the Western pilots, the evidence will demonstrate:

(1) That Western Air Lines' pilot personnel flew less mileage after the sale of Route 68 than they flew before the sale, with a consequent loss of earnings;

(2) That Western Air Lines' pilot personnel flew fewer and smaller aircraft after the sale of Route 68 than they flew before the sale, with a consequent loss of earnings;

(3) That Western Air Lines' pilot personnel had less night flying after the sale of Route 68 than they had before the sale, with a consequent loss of earnings;

(4) That twenty-odd of Western's more junior co-pilots were removed from Western's pay roll following the sale of Route 68;

(5) That the extension of Route 63 did not initially nor has it since equalled or replaced Route 68;

(6) That senior pilots who were flying Route 68 at the time of the sale were required to exercise their seniority and displace pilots junior to them on other Western routes, and that these senior pilots were then required to check out on these new routes with a consequent loss of earnings;

(7) That senior pilot captains who held permanent bids on Route 68, and who had been flying that route from its inception, were required, by reason of the sale, to exercise their seniority in dis-

placing captains more junior to themselves on other Western routes, and the junior captains so displaced were oftentimes demoted to reserve pilots or even co-pilots, with a consequent loss of seniority and greatly reduced earnings; [2044]

(8) The demotion of these junior captains to reserve pilots and co-pilots, in turn, necessitated demotion and loss of earnings throughout the entire pilot-personnel of Western Air Lines and culminated in the severance of 20-odd of the pilot-employees of the carrier.

(9) The evidence will show that not the least of the adverse effects suffered by the Western pilot-personnel in consequence of the sale of Route 68 was their forfeiture of seniority benefits, such as promotion rights, pilots' status, seniority number, all brought about by the drastic reduction in pilot personnel. Indeed the evidence will show that whereas prior to the sale some co-pilots were steadily employed; after the sale they were furloughed, called back to work and again furloughed. Pilot captains with permanent bid runs were reduced to reserve captains flying lighter equipment, and reserve captains, in turn, were reduced to flying co-pilot. Because of the sale of Route 68 the junior pilots of Western almost without exception are today further away from flying as captains than they were on the date of the sale, notwithstanding the passage of time and notwithstanding the expansion which has taken place by reason of the extension of Western's Route 63.

(10) The evidence will further show that the

growth and development of the present certificated scheduled air carriers is the result of innumerable consolidations, mergers and purchases, and for a long period of time and in every purchase, merger or consolidation of two or more air carriers the pilot-personnel involved have gone with the route and have been taken into the purchasing or consolidated companies without [2045] prejudice or loss to their employment or seniority rights.

Mr. Reilly: What is that word—"innumerable"?

Mr. Bennett: Innumerable.

Mr. Reilly: You can't count from one to three.

Mr. Bennett: What is that?

Examiner Wrenn: Go ahead.

Mr. Bennett: Well, I think I have a right to understand what he says. I cannot understand what he said.

Mr. Reilly: I said did you say "innumerable"?

Mr. Bennett: Yes, I did.

Examiner Wrenn: Proceed.

Mr. Bennett: In approving the sale of Route 68 without making any provision for the pilot personnel flying said route, the C.A.B. failed to recognize or appreciate that a transfer of route mileage from one air carrier to another necessarily prejudices the rights of pilot-personnel flying that route by eliminating pilot positions and causing a chaotic situation among those pilots remaining with the carrier. This is true because the contractual relationships between airlines and its pilot-personnel always provides for seniority. This seniority in turn gives to these pilot employees certain rights with respect to

given mileage on the route. Again when mileage of one air carrier is transferred, as in this case, without providing for a transfer of pilots flying the same, the rights and privileges of other pilot-employees of the carrier are disturbed and abridged because their replacement is permitted by pilots who have greater seniority, and this results in the elimination of pilot positions in that the junior pilots on the carrier's seniority list are eliminated. This error [2046] committed by the Board in permitting the sale and transfer of Route 68 without protection——

Examiner Wrenn: Don't you think that oral argument had better come after you have finished your case?

Mr. Bennett: Do you object to this?

Examiner Wrenn: I don't object to it, but it just sounds to me like oral argument about what was wrong with the Board's decision. It is a matter that you have a right to put in brief, and call to the attention of the Board, but as a matter of opening statement it is a little far afield to me.

Mr. Bennett: Would you like to have it stricken?

Examiner Wrenn: No, but it seems to me it is an oral argument. Is it necessary to your opening statement?

Mr. Bennett: No, nothing of this is necessary. We could have proceeded without any opening statement if we cared to present the case in that fashion. But I would like to finish the statement, if I may.

Examiner Wrenn: Go ahead. I will hear you a

little further on it. But not if it continues in the realm of argument.

I would point out to you here the question as to what the evidence will show is perfectly proper in your opening statement, but this sounds like argument.

Mr. Bennett: I think it is an opening statement, not argument.

Examiner Wrenn: Go ahead, but it sounds very much like argument to me.

Mr. Bennett: The obvious adverse effect upon the [2047] pilot-personnel which the sale of Route 68—Western's—would bring about, caused A.L.P.A. to take the position prior to the time that the C.A.B. approved the sale, that the Western pilots normally required to fly Route 68 must follow the sale of said route into the purchasing company, United Air Lines, and there be integrated into the seniority list of that carrier without loss of seniority. The resulting adverse effect on the pilot-personnel which our evidence will demonstrate took place by reason of the sale of Western's Route 68 makes the Association even more determined not to retreat from this original position, nor will it ever. It is the manner in which the pilot-personnel problem has been resolved in all air line consolidations, sales, and mergers in the past; it is a simple and just solution of the pilot-personnel problems in all like cases, and it is the solution in this case.

I would like to call Mr. Hoagland as our first witness.

Examiner Wrenn: All right.

Whereupon,

J. I. HOAGLAND

was called as a witness on behalf of the Air Line Pilots Association, and, having been first duly sworn, was examined and testified as follows:

Examiner Wrenn: What are your initials, please?

The Witness: J. I. Hoagland.

Direct Examination

By Mr. Bennett:

Q. Will you give the Examiner your address?
Where do you live? [2048]

A. 3326 South, 1940 East, Salt Lake City.

Q. You are a member of the Air Line Pilots Association?

A. I am.

Q. And you are a commercial air line pilot?

A. I am.

Q. By whom are you employed?

A. Western Air Lines.

Q. How long have you been in their employ?

A. Since about July, 1942.

Q. In September of 1947 what route were you flying?

A. I was flying Routes 19 and 52, between Salt Lake City, Utah, and Lethbridge, Canada, based at Salt Lake City.

Q. How long had you been flying those routes?

A. Approximately two years.

Q. Was that during all your time as a captain?

(Testimony of J. I. Hoagland.)

A. No. I had flown previous to that in Canada and Alaska.

Q. Well, during your domestic—that was during the war, was it not? A. Yes.

Q. During your domestic flying in ordinary operations had you always flown these two routes?

A. Yes.

Q. In what capacity were you flying?

A. As reserve captain.

Q. Will you explain to the Examiner what you mean by a reserve captain?

A. Well, a reserve captain is a captain who flies [2049] time left at a base after the big captains have flown their allotted time.

Q. And this time that the reserve captain flies, is that completely captain time?

A. Well, that would depend on the seniority. If he had enough seniority to fill up his full 85 hours, if there was enough time available for him to get in his full 85 hours, it would be full time.

Q. But all the time that a reserve captain flies is captain time? A. That is correct.

Q. And you get paid captain's pay?

A. Yes.

Q. Is there always surplus captain flying time for reserve pilots to fly?

A. It is the policy of our company that 10 per cent of the stipulated time with each base is not bid; therefore, left available to reserve captains.

Q. Now, I believe you stated you flew as a reserve captain for approximately two years prior to

(Testimony of J. I. Hoagland.)

September of 1947; is that right? A. Yes.

Q. And that was continuously? A. No.

Q. Now, do you know when the sale of Route 68, or the transfer of Route 68, took place?

A. It was in August or September, 1947.

Q. And will you tell us if your employment was affected in any regard at that time? [2050]

A. No, not immediately. But within a period of a short time I was affected.

Examiner Wrenn: When you say "short time," would you give us a better approximation, Mr. Hoagland?

The Witness: I would say 30 to 60 days.

Q. (By Mr. Bennett): What occurred?

A. I lost the flying time that I had been getting as a reserve captain.

Q. What brought about the loss?

A. It was brought about by the fact that a senior pilot to myself moved in to my base, and I was displaced from this time I was getting.

Q. What happened to you? You were reduced to what? Were you reduced to co-pilot?

A. That is correct.

Q. What was your average monthly earnings during this two-year period immediately preceding the transfer of Route 68?

A. Would you repeat the question?

Mr. Bennett: Would you read the question, Mr. Reporter?

(The question was read.)

The Witness: Approximately \$750 a month.

(Testimony of J. I. Hoagland.)

Q. (By Mr. Bennett): Now, after you were reduced to co-pilot, what was your average monthly earnings?

A. In 1948 the co-pilot scale was \$480 a month for a maximum—that was the maximum pay for co-pilots who had—that was the top bracket for the top co-pilot, so to speak. [2051]

Q. Has it changed since that time?

A. Yes, it has changed. In 1949 we obtained a new contract that placed the pay at \$525 per month.

Examiner Wrenn: Would you read the previous question, please?

(The record was read.)

Examiner Wrenn: I don't think you quite answered that question.

The Witness: It would be \$480 a month at that time.

Examiner Wrenn: I meant to get your particular facts. Go ahead.

Q. (By Mr. Bennett): Co-pilots receive a flat salary, do they not? A. Yes.

Q. That flat salary, however, varies with the length of service that the co-pilot has been with the company? A. Yes.

Q. And the top co-pilot's pay in 1948 was how much? A. \$480 a month.

Q. Is that the sum you received as a co-pilot after your reduction? A. Yes.

Examiner Wrenn: Where were you on the seniority list as co-pilot? Did you fly regularly?

The Witness: Yes.

(Testimony of J. I. Hoagland.)

Mr. Bennett: During what period?

Examiner Wrenn: After he was reduced back.

The Witness: Yes. I flew—well, I fly all of the time. [2052]

Q. (By Mr. Bennett): You are still flying as co-pilot, is that true? A. Yes.

Q. Do you know who it was—strike that.

Do you know where the pilot came from who moved into your base?

A. He came from the Los Angeles base.

Q. Do you know what route he had been flying previously?

A. Well, he would have been a reserve captain at that base, and would have had choice of flying the routes from Los Angeles to Salt Lake, or Los Angeles to San Francisco.

Q. Do you know why he moved out of that base?

Mr. Reilly: Mr. Examiner, that was not responsive to the question. The question asked where he flew, and he said he was based at Los Angeles and had a choice of flying two routes. I think the answer should be what route he flew, not the choice of routes.

We are here involving Route 68. If he just answers whether or not the man did fly Route 68, that would be sufficient.

Q. (By Mr. Bennett): Do you know whether he did or did not fly Route 68?

A. No, I do not know.

Examiner Wrenn: Now, were you going to with-

(Testimony of J. I. Hoagland.)

draw the next question? There was an objection to it.

Mr. Bennett: It may be withdrawn.

Examiner Wrenn: All right.

Mr. Bennett: You may cross-examine. [2053]

Examiner Wrenn: Does the Brotherhood have any questions?

Mr. Crawford: None.

Examiner Wrenn: There is no representative present for the U.A.W., is there?

(No response.)

Examiner Wrenn: All right, Mr. Renda, you may examine.

Cross-Examination

By Mr. Renda:

Q. How long have you been in the employ of Western Air Lines? A. Since July, 1942.

Q. Have you flown continuously since July, 1942?

A. Yes. I will have to make a statement on that. My employment started in July, 1942, and there was schooling to go through, necessary for me to qualify on the equipment, and it was at a slightly later date that I started flying.

Q. When did you start flying on Western's domestic operations? The date, please.

A. I would believe the date of release as a co-pilot on Western Air Lines was in November, 1942.

Q. Was your flying continuous on Routes 19 and 52 since November, 1942?

(Testimony of J. I. Hoagland.)

Mr. Bennett: In the same capacity I think it would be—well, I withdraw that.

Examiner Wrenn: Do you want the question again?

The Witness: Yes, please.

Examiner Wrenn: Read the question, Mr. Reporter.

(The question was read.) [2054]

The Witness: It was with the exception of the time I stated I was in Canada and Alaska flying during the war.

Q. (By Mr. Renda): When did you return from Western's Alaskan operation and resume flying on 19 and 52 within the United States?

A. I believe it was in August, 1945.

Q. Have you been furloughed at any time since August, 1945? A. No.

Q. What was your status as of August, 1945? By that I mean co-pilot or reserve captain, or otherwise? A. Reserve captain.

Q. How did you acquire the status of reserve captain?

A. I was promoted or released as a reserve captain after—when there was a need for, or the availability of time for me to fly.

Q. What are the advantages that exist by reason of being a reserve captain as compared to a co-pilot?

A. Well, it means that you get more money—I suppose that is the biggest interest.

(Testimony of J. I. Hoagland.)

Q. What are some of the disadvantages, Mr. Hoagland?

A. Well, I don't know that I could state any disadvantages.

Q. Isn't it a fact that your being a reserve captain is a voluntary choice on your part?

A. Well, I don't believe so. Because if I—a pilot has to show within a reasonable time that he is captain material or he can be dismissed from the company. So I wouldn't say it was entirely [2055] voluntary.

Q. As a reserve captain, you are not assigned to any particular route, are you?

A. You bid as a reserve captain on a bid basis, and you are not—no, you are not assigned to any particular route.

Q. You don't have any particular route to fly?

A. No.

Q. And isn't it a fact that one of the big disadvantages of being a reserve captain is that you are subject to being bumped pursuant to the seniority regulations of your company?

A. Yes, but that is also the case with any pilot, whether reserve pilot, co-pilot, or captain.

Q. The fact that you were bumped after the sale of Route 68, was there anything unusual about that procedure?

A. Well, the procedure, according to our normal procedure, I guess, is when there is a reduction.

Q. Isn't it a fact that the same thing would

(Testimony of J. I. Hoagland.)

happen if there were a cut-back of schedules which would reduce the flying time?

A. That is correct.

Q. Now, you indicated that after the sale of Route 68 your change in status from reserve captain to co-pilot was brought about by a pilot formerly based at Los Angeles exercising his seniority pursuant to the provisions of the A.L.P.A. contract with Western?

A. That is correct.

Q. What was the name of that pilot?

A. Bill Pelton. [2056]

Q. And at what time did he report at Salt Lake City base?

A. It was approximately June.

Q. Of what year?

A. 1947.

Q. June, 1947. At that time you were flying as a reserve captain on 19 and 52?

A. That is correct.

Q. You continued to fly as reserve captain on 19 and 52 until what date?

A. Until about September, 1948.

Q. September, 1948?

A. Yes.

Q. And during the period of time that you were flying as reserve captain your earnings approximated \$9,000 a year; is that correct?

A. Well, I would have to add it up. It would be approximately \$750 a month.

Mr. Bennett: May I have the question and answer previous to that?

Examiner Wrenn: All right. Read it, Mr. Reporter.

(The question and answer were read.)

(Testimony of J. I. Hoagland.)

Q. (By Mr. Renda): And it was not until after September, 1948, that there was a change in your status from reserve captain to co-pilot?

A. That is correct.

Mr. Renda: No further questions.

Examiner Wrenn: Mr. Reilly. [2057]

Mr. Reilly: No questions.

Examiner Wrenn: Mr. Kennedy, are you going to question for Public Counsel, or is Mr. Bechtold?

Mr. Kennedy: Mr. Bechtold is not here, Mr. Examiner, so I will.

Examiner Wrenn: All right, proceed.

Q. (By Mr. Kennedy): Is it correct that you were not reduced from reserve captain to co-pilot until a year after the sale of Route 68?

A. That is correct.

Q. Mr. Hoagland, could you give us a little bit fuller explanation of the distinction between a reserve captain and a co-pilot? I am not altogether clear on that. What is the difference in terms of what they do?

A. A reserve captain for all purposes you could call a captain. A co-pilot is the junior member.

Q. Does a reserve captain sometimes fly as a co-pilot? A. That is correct.

Q. But when flying as a co-pilot he gets a captain's pay?

A. No, he gets the co-pilot's pay.

Q. And his pay is determined by the capacity in which he is flying at given times?

A. That is correct.

(Testimony of J. I. Hoagland.)

Q. A reserve captain might have the status of a reserve captain, but on a flight he might be a co-pilot, on a given flight?

A. That is correct. [2058]

Mr. Kennedy: That is all.

Examiner Wrenn: How does a co-pilot become a captain on Western?

The Witness: He has to convince the company by——

Examiner Wrenn: I mean by that, does he become a reserve captain first, or is there a procedure where he automatically moves over and becomes a regular captain?

The Witness: Well, a situation could be arranged, I guess, that he could go direct from co-pilot to captain, but as a rule it doesn't happen that way. He becomes a reserve captain and then a captain.

Examiner Wrenn: A question was raised in my mind as a result of Mr. Kennedy's question, and all I was concerned about is the normal procedure of a co-pilot moving into a captain's status, and you say that is normally through reserve captain.

The Witness: Yes.

Examiner Wrenn: Any further questions?

Mr. Bennett: Yes, if I may.

Examiner Wrenn: All right, Mr. Bennett.

Redirect Examination

By Mr. Bennett:

Q. Was your employment in any wise affected, other than what you have indicated, within a very short period after the September, 1947——

(Testimony of J. I. Hoagland.)

Mr. Renda: I object to that question on the ground——

Mr. Reilly: I object to that in both form and substance.

Mr. Bennett: I think I have a right to know whether his [2059] employment was affected——

Mr. Renda: He should have asked that on direct.

Mr. Reilly: Not only that, but there is a proper way to ask the question. You don't have to lead him all over the entire——

Mr. Bennett: I think I have a right——

Mr. Reilly: It can be asked in a short sentence.

Examiner Wrenn: I think you were leading the witness there. We want all the information we can get from this witness, but I think you were leading.

Mr. Bennett: I will withdraw the question.

Q. (By Mr. Bennett): What was your exact status in September, 1947?

Mr. Renda: I think he has answered that question on direct, that he was in the status of reserve captain.

Q. (By Mr. Bennett): Is that correct?

A. September, 1947—at that time I believe I still had a temporary run as a captain. There was a short period in that one summer there that was additional flying time added, and I bid and was awarded a temporary run on DC-3 equipment.

Mr. Renda: I move that the answer be stricken as not responsive to the question.

Mr. Bennett: I submit it is responsive. If I may go on and ask another question, it will clear up.

Examiner Wrenn: All right, I will hear the

(Testimony of J. I. Hoagland.)

other question and then listen to the motion at that time. [2060]

Q. (By Mr. Bennett): Is that the same as a reserve pilot?

A. No, that would be the same as a captain. It was a captain, only it was temporary time. When they put out the temporary time it is just additional flying time, but they don't know how long it will be in effect, so it is just bid as temporary time.

Q. How many hours a month were you getting at that time, in that temporary bid?

A. Full time.

Q. Did you get the same amount of time subsequently?

A. No. After, oh, September, when that temporary time was abolished at my base I didn't get but approximately 60 hours a month of captain time.

Q. That 60 hours a month, I take it, was flown in what capacity?

A. As reserve captain.

Q. How long did that situation continue?

A. Well, I was in that capacity as reserve captain flying approximately that many hours until September of 1948.

Q. And September, 1948, was when you were reduced to co-pilot; is that correct?

A. That is correct.

Q. Was there any difference in your monthly pay, between—strike that, please.

Was there any difference between your average monthly earnings after September, 1947, and previous to that time?

(Testimony of J. I. Hoagland.)

A. Prior to September, 1947, I was getting very close to full month's quota of flying, as I recall, and after that [2061] I dropped to approximately 60 hours a month, which would be less from a value of dollars and cents standpoint.

Q. Can you tell the Examiner how much less?

A. Oh, it would be approximately \$150 a month less.

Q. And that continued until you were reduced to co-pilot? A. Yes.

Mr. Bennett: That is all.

Mr. Reilly: I have a couple of questions, Mr. Examiner.

Examiner Wrenn: All right, Mr. Reilly.

Recross-Examination

By Mr. Reilly:

Q. When were you first apprised that you were going to testify in this case, Mr. Hoagland?

A. Oh——

Q. Let me help you a little bit. You know the route was transferred, and the order of the Board was issued in September of 1947?

A. That is correct.

Q. How soon after that were you notified, or did you volunteer, that you would testify in this proceeding?

A. I was asked—I wouldn't know the exact date, but it was approximately six months ago.

Q. Did you review the dates of these various assignments you had in pilot personnel of Western Air Lines after that time? A. Yes.

(Testimony of J. I. Hoagland.)

Q. Why didn't you give us the exact dates of these [2062] various assignments today, then? What was this temporary assignment you were talking about? How long did it last as a captain?

A. It would be——

Q. Give me the dates?

A. Approximately two months.

Q. Give me the dates, now.

A. Well, it would have been from May, approximately the first of May, until the latter part of August or September.

Examiner Wrenn: What year?

The Witness: That was 1947.

Q. (By Mr. Reilly): What happened when this fellow came over in June to Salt Lake City?

A. My status wasn't affected at that time because there was available time for me there, even though he was senior to me.

Q. Is it your testimony that you were flying a full 85 hours a month?

A. I don't recall any interruptions in that time prior to then.

Q. Right on the nose? A. Very close.

Q. Now, as reserve captain you knew that—you were aware at all times that you were subject to bumping and reduction for any reason that mileage would be reduced on Western Air Lines, Routes 19, 52, 63, or anywhere else; is that right? [2063]

A. That is right.

Q. And you were somewhere between a hiatus

(Testimony of J. I. Hoagland.)

of co-pilot and reserve captain at all times?

A. That is right.

Q. And you were not affected as a reserve captain until 1948? A. That is right.

Q. And the only difference in that was your temporary run as a captain some time between May and August of 1947; is that correct?

A. That is about the sum and substance of it, I guess.

Q. You had this temporary run as a captain before the Board approved the transfer of Route 68; is that correct? A. Yes.

Q. This man who was transferred over to Salt Lake City, Captain Pelton, he was transferred two and a half months before the Route 68 transfer was approved; isn't that correct? Wasn't it in June? A. That is right.

Mr. Reilly: I have no other questions.

Examiner Wrenn: Mr. Renda.

Q. (By Mr. Renda): Your status of reserve captain never changed, did it, during that period of 1947? A. No.

Q. That was more or less your permanent status? A. Yes.

Q. And when you were assigned as a temporary captain [2064] you fully recognized that that was a temporary assignment? A. That is correct.

Q. Where were you flying in August, 1947?

A. From Salt Lake City to Lethbridge, Canada.

Q. Are you familiar with the fact that in the

(Testimony of J. I. Hoagland.)

summer months of 1947 Western operated a schedule between Salt Lake City and West Yellowstone?

A. Yes.

Q. Do you know on what date that schedule change was effected—that that schedule was removed?

A. It would have been approximately the last of September, or first of October.

Q. Isn't it a fact that the schedule was changed on September 15, 1947?

A. Well, if you have the dates there, I guess you hit it closer than I did. I said approximately the latter part of September or first of October.

Q. You indicated you flew maximum time. Maximum time is 85 hours? A. Correct.

Q. Isn't it a fact that if you fly maximum hours, that you are only scheduled to 80 hours?

A. No, that isn't correct.

Examiner Wrenn: Are you talking about Mr. Hoagland, himself.

Mr. Renda: Yes.

The Witness: I can fly up to not over 85 hours, but I can fly 84 hours and 59 minutes. [2065]

Q. (By Mr. Renda): How many hours did you fly in May, 1947?

A. I don't have that information.

Q. How many did you fly in June, 1947?

A. I don't have that information, except to state, as I did before, that I was flying approximately full time.

Q. How many hours did you fly in July, 1947?

(Testimony of J. I. Hoagland.)

A. The same answer.

Q. How many hours did you fly in August, '47?

A. The same answer.

Q. How many hours did you fly in September, 1947? A. The same answer.

Q. Were there any others that were transferred to Salt Lake City base at the same time as Mr. Pelton in June, 1947? Any other pilots?

A. Yes.

Q. Do you recall their names?

A. Mr. Hall.

Q. Any others that you remember?

A. I don't recall any others.

Q. And Mr. Pelton and Mr. Hall were transferred in June, 1947, and they were assigned to fly on Route 19 and Route 52 at that time?

A. That is correct.

Q. No one lost any flying time in June, 1947, did they? On Route 19-52? A. No.

Q. To your knowledge.

A. To my knowledge.

Q. You didn't lose any in June or July, did you? [2066] A. No.

Mr. Renda: That is all.

Examiner Wrenn: Mr. Kennedy.

Q. (By Mr. Kennedy): Do you recall what your average monthly compensation was in the months May to August, 1947?

A. Approximately \$750 a month.

Q. And what was it in the period between August, 1947, and September, 1948?

(Testimony of J. I. Hoagland.)

A. As I stated before, it would be approximately \$150 less.

Q. And after September, 1948, it was \$480 a month?

A. Yes, until 1949 when we received our raise.

Q. What was the date of the raise, do you know?

A. It was the first of January, 1949, as I recall.

Mr. Kennedy: That is all, Mr. Examiner.

Mr. Reilly: I have one other question, if I may.

Examiner Wrenn: All right, Mr. Reilly.

Q. (By Mr. Reilly): The reason for the \$150 difference was the difference between the captain on the temporary run and the reserve captain status; is that correct?

A. No; because I was not getting as much time.

Q. The reason for that difference was that you had bid in as a temporary captain on the DC-3; is that right?

A. While I was flying this temporary run. The time previous to that before these other fellows came in to the base I was getting very close to full, as I recall, and after this other fellow came in his seniority affected mine, and I [2067] didn't get as much.

Q. You were getting full time prior to May, 1947?

A. Very close.

Q. In other words, you didn't get much additional time as captain on this temporary run; is that right?

A. Yes.

(Testimony of J. I. Hoagland.)

Mr. Kennedy: May I ask one more question, Mr. Examiner?

Examiner Wrenn: All right.

Q. (By Mr. Kennedy): Was your rate of pay as temporary captain the same per hour as reserve captain?

A. It would be very much the same.

Mr. Kennedy: Thank you. That is all.

Examiner Wrenn. Thank you, Mr. Hoagland. You are excused.

Mr. Bennett: Mr. Horn.

Whereupon,

C. M. HORN

was called as a witness on behalf of Air Line Pilots Association, and, having been first duly sworn, was examined and testified as follows:

Examiner Wrenn: Will you give your initials and address to the reporter?

The Witness: C. M. Horn, 3627 Jackson, Denver, Colo.

Direct Examination

By Mr. Bennett:

Q. You are a commercial air line pilot?

A. Yes.

Q. Employed by Western Air Lines? [2068]

A. Yes.

Q. How long have you been employed by Western Air Lines?

(Testimony of C. M. Horn.)

A. Since March 23, 1943, and my seniority date is April 14, 1943.

Q. By whom were you employed previous to your employment with Western Air Lines?

A. I was hired by Inland Air Lines.

Q. On what date?

A. On the date I just gave you.

Q. You mean both dates?

A. March 23, 1943.

Q. And you have—what did you say your seniority date was with Western?

A. April 14, 1943, which was also my Inland seniority date.

Q. Will you explain that to the Examiner?

A. I hired out as an Inland pilot. Late in 1944 Western Air Lines acquired Inland Air Lines and my seniority was then transferred to a combined list which included all Inland pilots and all Western pilots, and became the seniority list under which we now operate.

Examiner Wrenn: You retained your same seniority date in Western as you had when you entered Inland?

The Witness: That is correct. Full credit for my work with Inland was given when Western bought in.

Examiner Wrenn: All right, Mr. Bennett.

Mr. Bennett: I think there was an error in his statement, and, if so, would you read back what his seniority [2069] dates were, and when he went to work for Western?

(Testimony of C. M. Horn.)

The Witness: If I may, I can explain that. I was hired March 23 by Inland——

Q. (By Mr. Bennett): What year?

A. 1943. And I was required to qualify on the routes and the equipment as co-pilot, and then my seniority date is the one upon which I flew the first trip as a member of an Inland crew. So that accounts for the time period there of three weeks when I was qualifying.

Q. How long were you working for Inland before you went to work for Western?

A. It is all the same thing. I mean, my Inland employment was the same as my Western employment, but there was a period of slightly over a year there before Western acquired Inland.

Q. And you say this master seniority list that was made up of the Inland and Western pilots, is that the seniority list that is now in effect?

A. That is correct.

Q. What route were you flying for—what route were you flying in September, 1947?

A. I was flying Routes 28 and 35 out of Denver.

Q. In what capacity?

A. As reserve captain.

Q. Where does that route run from?

A. Route 28 is Denver, Great Falls, Montana, and 35 is Denver, Minneapolis, Minn.

Q. You say you were flying those routes as a reserve [2070] captain at that time?

A. That is correct.

Q. How long had you been so flying?

(Testimony of C. M. Horn.)

A. I had built up about two years as a reserve captain with Inland and Western.

Q. Immediately? I mean, had you been flying steadily for those years as a reserve captain?

A. If I may say, I would rather not get into that because I was flying both captain and co-pilot, and it gets much more involved than Mr. Hoagland's problem.

Examiner Wrenn: Well, I don't think we need get that far back in it.

Mr. Renda: We will give you a gold star when we get back.

The Witness: I am sorry the situation was so, because I would rather have had full captain time, but I wasn't getting full time.

Q. (By Mr. Bennett): Do you know how your time was divided? Were you getting more captain time than co-pilot time?

A. Yes. During this two-year period I was flying—I was listed as a reserve captain and flying predominantly captain time.

Q. What were your average monthly earnings during that period?

A. Well, I haven't averaged them, and, well, some months it was very good, I would get a good month as captain, and then the next month I would fill in with co-pilot time. But—well, if I can get around it, I would rather not set [2071] an average because I might be far enough off to make it look fishy.

(Testimony of C. M. Horn.)

Q. You don't know what you were earning during that period?

A. I know what I was earning, but I would have to check to be explicit on it.

Q. Well, can you give us your best—

A. Well, say, conservatively \$600 a month.

Q. Do you think it would certainly equal that much? A. As I recall, it would.

Q. Do you know when the sale of Route 68 took place?

A. Yes. It happened at the time I was in Los Angeles and was forced to ride another air line to Denver, so the date is quite fixed in my mind. It was September 15, 1947.

Q. Now, was your position as a reserve captain in any wise affected on that date?

A. Not on that specific date, but a short time thereafter.

Q. How long thereafter?

A. Well, within 30 days.

Q. What happened to you?

A. We had two pilots who under the contract were allowed to bid into Denver—and when I say under the contract, they were senior men who had been flying Route 68, and they bid back into the Denver base which precluded any chance I had of obtaining reserve flying from the time they were qualified on the routes I had been flying on.

Q. And what happened to you then? [2072]

A. Well, I lost my classification as a reserve pilot then, and I became a co-pilot.

(Testimony of C. M. Horn.)

Q. And what were your earnings as a co-pilot?

A. At the time I was immediately bumped back it became \$380, which subsequently became \$480 due to a retroactive contract we negotiated. And I am quite aware of what took place there as I have been on the negotiating committee for several years, and was in on that.

Q. Co-pilots are paid a flat salary?

A. That is correct.

Q. And have you been flying as co-pilot ever since? A. That is correct.

Q. Have you translated the difference in pay between that which you might have earned had you remained as a reserve captain, and your earnings as a co-pilot for the period from that date until presently?

A. Well, I haven't very specifically, but had I been able to continue as reserve there would have been about \$150 a month difference.

Q. From what date?

A. Well, from any date you choose. It took place in September of 1947.

Q. And has continued until to date?

A. Yes, that is right. It would be roughly a total of around \$4,000, then, if I figure it correctly.

Q. Have you always flown these two routes?

A. That is right.

Q. You have always been on these two routes in domestic operations? [2073]

A. Yes. There was a time on Inland when we had our contract with the Army I was flying cargo, but that was domestic also, and in my service with Inland and Western I have flown either co-pilot

(Testimony of C. M. Horn.)

or captain on these two routes.

Mr. Bennett: You may cross-examine.

Examiner Wrenn: Does the Brotherhood have any questions of this witness?

Mr. Crawford: No questions.

Examiner Wrenn: Mr. Renda, you may examine.

Cross-Examination

By Mr. Renda:

Q. On what date were you made a reserve captain?

A. It was the date following the day I got my rating, my air transport rating, which I can give you here in a minute.

Q. Please.

A. My rating was issued January 7, 1946, and right after that I was elevated to reserve captain's rating with Western.

Q. Prior to then you were a co-pilot?

A. Yes, sir.

Q. And you were employed continuously during the time you were a co-pilot?

A. Yes, sir.

Q. Have you ever been furloughed, or did you ever lose any time for reasons other than your own?

A. I have never lost any flying time as co-pilot or captain, but I have lost a lot of captain flying. I was flying one or the other for the whole period. I have never [2074] been furloughed.

Q. You are only qualified to fly DC-3 aircraft; is that correct?

A. That is correct.

Q. So that at no time have you been interested

(Testimony of C. M. Horn.)

in being transferred from the Inland division over to Western and qualifying on DC-4 aircraft?

A. I have been quite interested, but I have never had seniority enough to do that.

Q. You mean the seniority provision of your contract precludes you from making that transfer?

A. Well, in effect, yes.

Q. In other words, you could make the transfer, but you wouldn't be able to get any flying time?

A. Yes. The flying on 4's is more lucrative and consequently more attractive.

Q. So the older boys hold onto it?

A. That is correct.

Q. Is Denver, Colo., your home?

A. It is now.

Q. How many flight crews are based at Denver?

A. Currently, we have—the last time I checked it was 18.

Q. There isn't much of a turnover in flight crews on the Inland division, is there?

A. It has been very stable with the exception of the time these fellows who had been flying Route 68 bid out and then returned. That is the only change we have had for a number of years. It is stabilized. [2075]

Examiner Wrenn: Let me ask you a question: Your answer raised a question in my mind there.

Did some pilots off of Inland bid in and get runs off of Route 68 when that was awarded originally to Western?

The Witness: That is right. And while some of

(Testimony of C. M. Horn.)

them stayed in Los Angeles, the ones who affected me very directly were two very senior men, and immediately upon United's start of the operation of Route 68 they returned to Denver and I lost my reserve status.

Examiner Wrenn: They had been on Inland originally?

The Witness: They were on Inland originally and over to Route 68, and then came back to Inland off Route 68.

Examiner Wrenn: Go ahead, Mr. Renda.

Q. (By Mr. Renda): Isn't it a fact that one of the reasons you were able to obtain reserve captain status was by reason of the fact that men transferred over from Inland to fly Route 68?

A. That is correct.

Q. And you were assigned co-pilot status how long after September 15, 1947?

A. My reassignment came in December, 1947, for the very reason that we receive an instrument check every six months, and my previous instrument check had been in June and I was not due for a check until December, and they left me classed as a reserve until my instrument check was due, as there was no—no reason for doing otherwise. Then when I came up for my instrument check I was removed from that classification. But I got no captain time between September [2076] and December there.

Q. Well, now, on direct examination you testified that you were affected 30 days after September

(Testimony of C. M. Horn.)

15. Now, that is inconsistent with what you just said with respect to your change in status. Which is correct?

A. Well, did I say exactly 30 days?

Q. Well, the record will show. But I have 30 days after September 15 here. In other words, I want to know, Mr. Horn, just when you left the status of reserve captain.

A. Well, the status of reserve captain is something we are qualified for by receiving an instrument check, if we hold the rating to fly that.

Q. When did you receive that instrument check—December?

A. My next check was due in December, and it was not given because there was no longer need for me to be classed as a reserve captain.

Q. So you were reserve captain until December, 1947?

A. Yes, I am sure the company records will show that.

Q. Your earnings of \$600 a month, or approximately \$7,200 a year, prior to September 15, 1947, was that with the retroactive pay adjustment?

A. Yes. And it is better than that under the last contract; we draw five and a quarter if we are a senior co-pilot.

Q. Isn't it a fact, Mr. Horn, that should there ever be a change in schedules, and particularly a decrease in schedules operated on the Inland division, that the obvious result would be a reduction in flying time? [2077]

(Testimony of C. M. Horn.)

A. That is absolutely correct.

Q. Would not a pilot under those circumstances be as adversely affected as you would be in this particular instance?

A. I can see no other way that it can be affected.

Mr. Renda: No further questions.

Examiner Wrenn: Mr. Reilly.

Mr. Reilly: I have no questions.

Examiner Wrenn: Mr. Kennedy.

Q. (By Mr. Kennedy): Mr. Horn, as I understand it, you lost your status of reserve captain in December, 1947? A. Yes.

Q. When did you begin to lose your time as a relief captain?

A. As soon as the men who were moved back from 68 were qualified on the routes I was flying.

Q. That would be about when?

A. Roughly, two weeks.

Q. So it would be some time after the end of September, probably?

A. Yes, it would be. They were moving back to Denver and getting settled again, and starting to fly.

Q. But probably by the middle of October?

A. Yes.

Q. Is it correct that your testimony is that the reason you didn't continue as a reserve captain was that you didn't have the necessary instrument checks, and they weren't made because it seemed a futile gesture in view of the fact [2078] that there was no reserve time?

(Testimony of C. M. Horn.)

A. That is correct.

Mr. Kennedy: That is all I have.

Examiner Wrenn: Mr. Bennett.

Redirect Examination

By Mr. Bennett:

Q. However, you lost your time as a reserve captain when?

A. He just brought that out. I lost it just as soon as these fellows were qualified.

Q. Do you remember just when that was, to the best of your recollection?

A. Some time between October 15——

Q. 1947? A. Yes.

Q. Do you remember when these two pilots senior to you came into the base?

A. Well, immediately upon the loss of Route 68. I can't give you dates. They started moving and qualifying just as soon as they could get from Los Angeles to Denver.

Q. And your continuance to fly as a reserve captain after they moved into the base was during the period when they were qualifying; is that right? A. Yes.

Mr. Benentt: No further questions.

Examiner Wrenn: You may be excused.

(Witness excused.)

Examiner Wrenn: We will take a five-minute recess at this time. [2079]

(There was a short recess taken.)

Examiner Wrenn: All right, Mr. Bennett, call your next witness.

Mr. Bennett: Mr. Stephenson.

A. W. STEPHENSON

was called as a witness on behalf of Air Line Pilots Association, and, having been first duly sworn, was examined and testified as follows:

Examiner Wrenn: Give the reporter your initials and address.

The Witness: A. W. Stephenson, 316 Via Colusa, Redondo Beach, Calif.

Direct Examination

By Mr. Bennett:

Q. You are a commercial air line pilot?

A. I am.

Q. You are employed by Western Air Lines?

A. That is right.

Q. How long have you been employed by Western?

A. My seniority date with Western is as of May 5, 1928.

Q. Is that the date you went to work for Western Air Lines? A. No.

Q. When did you go to work for them?

A. August 1, 1947.

Q. Will you explain to the Examiner about that——

Examiner Wrenn: Just a minute.

(Testimony of A. W. Stephenson.)

Read the last answer, Mr. Reporter. [2080]

The Witness: I beg your pardon; August 1, 1937.

Mr. Renda: Yes.

Examiner Wrenn: Let Mr. Bennett ask his question again. I interrupted him.

Mr. Bennett: Strike the question and I will re-state it.

Q. (By Mr. Bennett): What is your seniority number with Western?

A. My seniority number is three on the last published list.

Q. Are there other active pilots who are above you on the list? A. No.

Q. You are the most senior active pilot; is that correct? A. That is right.

Q. Will you explain to the Examiner how it comes about that your seniority date is '28, whereas you went to work for Western in '37?

A. The May 5, 1928, date was the day I went to work for National Parks Airways. The original route between Salt Lake City and Great Falls. On August 1, 1937, Western Air Lines took over the operation of the National Parks Airways, that is, bought the route.

Q. And what happened to the pilots of National Parks?

A. All the pilots of National Parks Airways were taken with the sale of the route and were integrated into the seniority list of Western Air Lines.

(Testimony of A. W. Stephenson.)

Q. And is that seniority list on the seniority list presently in effect on Western? [2081]

A. It is, with the addition of pilots of Inland Air Lines that were integrated into it.

Q. In September, 1947, what route were you flying for Western?

A. Route 68, Los Angeles to Denver.

Q. And you were flying that route in what capacity? A. As a captain.

Q. As a bid captain?

A. As a bid captain; that is right.

Q. When had you bid upon the route?

A. March, 1946.

Q. Were you awarded the bid at that time?

A. I was.

Q. And when did you qualify and start flying the route?

A. I completed my qualification between March 26 and April 26, 1946. I started flying the route on the 29th of April, 1946.

Q. And did you fly it continuously subsequent to that time? A. That is true.

Q. And up until when?

A. Up until September 15, 1947.

Q. Now, September 15, 1947, was that the date that the route was transferred to United?

A. That is right.

Q. How was your employment affected?

A. I was required to transfer and qualify on another [2082] route.

Q. Did you bid another route then?

(Testimony of A. W. Stephenson.)

A. Not on that exact date was it bid. It was a matter of exercising seniority rights and going to another route.

Q. What other route did you go to?

A. Route 63.

Q. And when you went to Route 63 was it necessary for you to qualify on that route?

A. That is right, it was.

Q. How long did it take you to so qualify?

A. It took me the first 22 days of September, 1947.

Q. Do you know how many hours it took you?

A. Some—about 50 hours of flying.

Q. And how are you paid for that flying?

A. We are not paid for flying while qualifying. However, if I may explain how this came about, on August 26 when the decision of the Board was announced I realized I was going on vacation on September 1, and on September 15 when I returned I would be the senior pilot on Western Air Lines, but I would not be qualified to fly on any of their routes until I completed my qualification. So I arranged for a change of vacation schedules with someone who could conveniently protect himself in the same situation, and continued to fly to Denver and qualify to Seattle on Route 63. This was not completed until about the 22nd or 23rd of September. So, between September 15, when I lost my complete qualification to earn money, so to speak, as—earn flight pay—I was about two-thirds of the way through the qualification. And I flew 21 hours

(Testimony of A. W. Stephenson.)

of time as being in charge of the flight, the [2083] qualifying flight, for which I was not paid.

Q. Have you computed what this loss to you amounted to? A. Yes. It is about \$175.

Q. And you were awarded your bid on Route 63, I take it? A. Yes.

Q. And since that time you have been flying Route 63? A. That is correct.

Q. As a captain? A. As a bid captain.

Q. Now, during the time that you flew Route 68 did you get any night flying? A. Yes.

Q. Is a pilot compensated something in addition for his night flying? A. That is right.

Q. As distinguished from day flying?

A. That is right.

Q. Can you tell us what your approximate monthly earnings were during the time you were flying Route 68?

A. Route 68 on the night runs, the pay was—as was eventually awarded, amounted to about \$1,135 per month for an 80-hour month. However, we consistently averaged close up to the maximum of 85 hours. That is our average——

Q. When you say “we,” do you include yourself?

A. Myself, and the other captains flying the route. So that would be a little bit more money occasionally than that. But it should average about that amount. [2084]

Q. \$1,135 a month? A. That is right.

Q. Now, after you left Route 68 and were re-

(Testimony of A. W. Stephenson.)

quired to qualify on Route 63, did you still get night flying?

A. A small amount. The proportion of the night flying was cut appreciably.

Q. And what was your average monthly earnings after you left Route 68 and began to fly Route 63?

A. That would be—it would be about—it would average about \$150 a month less, because the proportion of the night flying was reduced from a total of all down to about 25 per cent.

Q. And how long did that condition last?

A. That condition prevailed for about eight or nine months until the spring of 1946. Then schedules and experience on Route 63 permitted the senior captains to go to the night runs. But——

Examiner Wrenn: What do you mean——

The Witness: I mean that originally there was a considerable period of time before it was permissible for the pilot to bid a particular run, a particular series of round-trips over the route. It was a matter of qualifying.

For instance, the company has a very good rule that you must fly 100 hours over the route before you fly a trip on which there is listed night flying. And just as we did on Route 68, we went farther and continued alternating trips until we have several months of experience on Route 63.

Q. (By Mr. Bennett): Have you translated this loss into a matter of [2085] dollars, Captain?

A. It would be approximately nine months at \$150 a month. \$1,350.

(Testimony of A. W. Stephenson.)

Mr. Bennett: May I have this marked for identification as Exhibit 1, Mr. Examiner?

Examiner Wrenn: Well, now, are you going to offer all of these documents that you have submitted here marked Exhibits 1 through 18?

Mr. Bennett: Yes, I am.

Examiner Wrenn: Well, now, why not mark the entire series for identification at this time?

Mr. Bennett: The difficulty with that, Mr. Wrenn, is that there is such a great length of time elapsed between the time these exhibits were compiled and submitted that it has been necessary for us to supplement them in order to bring down to date the information therein in order to have a complete picture, it has been necessary to supplement Exhibits 2 through 17. We have supplemental Exhibits 2 through 17 which are identical with the Exhibits 2 through 17 which you have, but which, however, contain supplemental material to that which brings those exhibits—the statistical exhibits—down to date to include the picture on Western Airlines from the date that these exhibits stopped until the present time.

Examiner Wrenn: Have you furnished that to other counsel?

Mr. Bennett: I have them here this morning.

Examiner Wrenn: Why haven't they been furnished to counsel before?

Mr. Renda: Mr. Examiner, I am going to reserve my [2086] objection until such time as Mr. Bennett makes an offer of that new material, but at that

(Testimony of A. W. Stephenson.)

time I am going to make a vigorous objection. I submit that if that is supplemental to these exhibits they should have been submitted to us a long time ago. We have had no opportunity to study it and to prepare cross-examination on it.

Mr. Bennett: This is exactly the same statistical material except that it is brought up to date.

Examiner Wrenn: There is no argument about that, but these gentlemen should have an opportunity to look at these before today.

Mr. Bennett: I have them here today.

Examiner Wrenn: I know that, but why were they not submitted previously?

Mr. Bennett: We didn't have them prepared until a few days ago.

Mr. Reilly: As a matter of fact, he didn't even supply the initial exhibits, as you directed him to do, until some time in May.

Mr. Bennett: May I have the exhibit marked?

Examiner Wrenn: I understood you were going to offer Exhibits 1 through 18 as they have been distributed. I am going to direct that they be marked for identification. If you have further material to add to them I suggest that you give it to counsel immediately, and when they make their objection I will rule on the situation at that time.

(A.L.P.A. Exhibits Nos. 1 to 18, inclusive, were marked for identification.)

Examiner Wrenn: Proceed, Mr. Bennett. [2087]

Q. (By Mr. Bennett): I show you a document

(Testimony of A. W. Stephenson.)

now marked for identification as Air Line Pilots Exhibit 1, and ask you to state who compiled that exhibit?

A. It was compiled under my direction.

Q. And supervision? A. That is right.

Q. And will you tell us where the material was obtained for the compilation of this exhibit?

A. From my own knowledge, and through contact and working with the individuals mentioned in the exhibit.

Q. When you say the individuals mentioned in the exhibit, you mean the individuals whose statements are contained in the exhibit?

A. That's is right.

Q. On pages 2 to 7? A. That is right.

Q. Where were these statements obtained?

A. In Los Angeles, Calif.

Q. And what were the circumstances of your meeting with these individuals?

A. We called them to make the statements; first, to discuss and get at the facts in each individual's case.

Q. And were they selected, or did you call—how did it come about that these particular individuals were called?

A. Well, you came to Los Angeles, to Hollywood, and told me you wanted to take some statements from pilots affected. And I proceeded to contact the individuals who were in town available to get together and make the [2088] statements, make a sworn statement.

Q. Were these individuals selected, or did you

(Testimony of A. W. Stephenson.)

just pick them at random because they happened to be in the city at that time?

A. The first governing factor in that was to contact to see who was in town and to see who could be available for making such a statement, and also to give some consideration to the distance that some men might have to travel to make a statement. And then everyone that could be contacted was contacted.

Q. And they came in and made a statement, did they? A. They did.

Q. Was that a sworn statement?

A. That is right.

Q. What have you done with those statements? Have you still got the sworn statements?

A. I have.

Q. And those sworn statements, one copy of it, was furnished to the Board here, was it not?

A. That is right.

Q. What have you done in this exhibit with reference to those statements?

A. Briefed them—that is, taken the pertinent information, what I consider the pertinent information in it, and reduced it to a shorter, less volume.

Q. Now, when you moved to Route 63 did you displace any pilot there? A. That is right.

Q. Who did you displace? [2089]

A. It is hard to select the individual, for this reason: Fourteen of us—not fourteen, but twelve of us moved over, or were in the process of changing to that route over a period of 45 days. And to name

(Testimony of A. W. Stephenson.)

any individual that stopped flying that route the day I started would be rather difficult to do. However, I know of one individual from his place on the seniority list who would be pretty close, No. 7 in that list. Mr. John Barchard.

Q. Well, when these 14 individual pilots were moved into that base, where did they come from?

A. There was no move involved, no move into Los Angeles base when 63 was extended.

Q. Will you strike the question, please. I would like to ask that over.

When you moved from Route 68, how many captains were moved from that route at that time?

A. The original list of bid captains at the last time the official notice was given us of who held bids on 68 contained 14 names.

Q. And those 14 captains were required to move off of 68 necessarily; is that right?

A. They were required to quit flying Route 68.

Q. How many of them went to Route 63? That you know of.

A. In bid captains, all but—there were two who went to Denver and 12 indicated or retained the rights they already had on Route 63.

Q. What did that do to the captains who were flying Route 63 at the time? [2090]

A. That put some of the junior DC-4 captains back to flying the Los Angeles-San Francisco portion of 63. Next in the sequence of seniority they

(Testimony of A. W. Stephenson.)

went back to flying DC-3's on Route 13. That is generally the picture.

Q. And what happened to the men who were displaced by those people who moved back?

A. They went back to whatever their seniority entitled them to as a reserve captain or co-pilot, or off the pay roll.

Q. When you say the pay roll, were there any pilots who were dropped from the pay roll on or about this time? A. Yes.

Q. Did the company give notice of any removal from the pay roll? A. It did.

Q. Do you know when that took place?

A. The date remains in my memory. It was September 4, 1947.

Q. And how many were notified of removal on that date?

A. I believe the list of names was 23.

Q. And were those pilots in fact dropped from the—furloughed?

A. Yes, with the exception of the top three or four who at that time were able to stay on for a little while longer because of vacations.

Q. Were they ultimately furloughed?

A. Yes. All of those men had been, as far as I remember, given furloughs at some time or other subsequent to [2091] September, 1947.

Q. Now, Mr. Stephenson, you are prepared, are you not, to sponsor this exhibit? A. I am.

Mr. Bennett: I offer this exhibit in evidence.

Examiner Wrenn: The ruling will be deferred

(Testimony of A. W. Stephenson.)

on it until you finish all your exhibits. At that time I will rule on all of them together.

Q. (By Mr. Bennett): Will you now look at this exhibit and tell us what it shows?

A. The second paragraph shows that the monthly pay of DC-4 and DC-3 captain air line pilots with Western Air Lines in September, 1947, was as follows: DC-4 captains, \$1,035; DC-3 captains, \$815—

Examiner Wrenn: Let me interrupt here. There isn't any need to read this into the record. We can all see the figures in the exhibit.

The Witness: I wanted to explain how I arrived at that figure.

Examiner Wrenn: All right, go ahead.

The Witness: The \$1,035 is a figure of an eight-year DC-4 captain flying 80 hours a month, half day and half night. That is as good—as near as I could decide, a good average figure for a DC-4 captain.

The DC-3 captain—

Examiner Wrenn: That is all over Western's system; it doesn't relate to any particular run?

The Witness: That is right, sir. [2092]

The DC-3 captain is a five-year captain half day and half night.

The DC-4 co-pilot, \$420, and the DC-3 co-pilot, \$350, the reason for that is that when Western started operating Route 68 there was no pay scale for DC-4 captains or co-pilots. The pilots hoped to be able to establish a four-engine rate of pay

(Testimony of A. W. Stephenson.)

that was higher than the two engine; and by the same token we expected we might come out of negotiations with an equipment differential for the co-pilots—whenever it could be done. So it was natural that when that was settled that the senior co-pilots were inclined to want to fly DC-4's when they could.

So in arriving at an average figure of \$420, that is 60 less than the top that was finally paid. But it would be an average figure down the line.

For instance, the last trip I made on Denver, because of the qualifying and starting Route 63, I had the junior co-pilot on the route flying with me. The same is true of the DC-3's co-pilots' pay statement. It is not a fixed figure. It is an average.

Q. (By Mr. Bennett): Does this exhibit, Captain Stephenson, purport to show—

A. If it is in order, may I clarify the Examiner's question? This \$1,035, that is, as I explained, half day and half night on a DC-4 captain with eight years' experience. That is what that figure is. And I figured that was a good average figure.

You asked, I believe, if that was the rate of pay over [2093] the system.

Examiner Wrenn: Well, what I was thinking about was whether it was based on system-wide, or just on Route 68.

The Witness: There is no terrain pay on that route, sir, and none on Seattle.

Examiner Wrenn: All right; thank you.

(Testimony of A. W. Stephenson.)

Q. (By Mr. Bennett): Are you acquainted, of your own knowledge, with what occurred in the employment situation of many of these individuals who are named in this exhibit? A. I am.

Q. From what source do you gain your knowledge of that?

A. From talking with the individual, and as master chairman of the Western Air Lines Council of A.L.P.A. it was my duty to keep all assignments and bid awards, and copies of all bids, to be advised as to who was—well, to see that things were in order, so to speak.

Q. Did the company furnish you, or did you obtain at the time that they were issued, all bids that were awarded to these individuals during this period, and subsequently?

A. That is right, I did.

Q. And you are acquainted with what happened to each of the pilots during this period?

A. That is right. I have the records, and am acquainted with the situation.

Q. Yes.

Now, Mr. Stephenson, does this exhibit purport to show the loss to all of the pilots who had any loss by reason of [2094] or subsequent to September 15, 1947?

A. It neither shows all of the losses nor any of the pilots. It is a cross-section of junior and senior, comparatively senior pilots, and co-pilots, and it is just a sample, so to speak, of what occurred to

(Testimony of A. W. Stephenson.)

different individuals in different places on the seniority list.

Q. Have you always worked as a pilot in the industry, Mr. Stephenson? A. No.

Q. What other capacities have you held?

A. From December, 1935, to August, 1947, I was vice-president of operation—I beg your pardon, 1937, I was vice-president of operations of National Parks Airways. And from August 1, 1937, until April of 1939 I was division superintendent at Salt Lake for Western Air Lines.

Q. And in your capacity as division superintendent and vice-president of operations, what were your duties?

A. To direct the operations of the route of what is now 19.

Q. During that period did you make up schedules or have schedules made up under your jurisdiction or supervision?

A. The traffic department made the passenger schedules with our cooperation.

Q. Now, do you know, Captain Stephenson, how many pilots are necessary to keep a DC-4 in operation by an air line?

A. An accepted figure for that is about—that is, for every DC-4 airplane, about three and a half crews. About [2095] seven men is a good average figure.

Q. Is that the average figure or is that the minimum figure?

A. When you get into an efficient operation, par-

(Testimony of A. W. Stephenson.)

ticularly such as 68, it gets to be a minimum figure.

Q. When you say three and a half crews, that is two men to a crew? A. That is right.

Q. It takes seven men; is that correct?

A. That is right.

Q. Now, what was the operation of Route 68, the normal operation on Route 68, do you know?

A. The normal operation was four round trips a day between Los Angeles and Denver.

Q. How many DC-4 planes does that require?

A. It took four airplanes and just under 39 hours of flying.

Q. And so how many men in all would that require?

A. Well, I have calculated that. The absolute minimum, if every man flew 85 hours a month for a 30-day month, would be 28 men. That is a physical impossibility. He would have to fly right up to the maximum and it cannot be accomplished.

When it comes down to it, this figure that I have used, 80 hours per month, is a month-in-and-month-out monthly average that a pilot can fly, that the company can get out of their pilots—or put it the reverse way, the pilot can fly and earn money. So in summer months when there are no cancellations, or they are at a minimum, they would take at least [2096] two to three more money to operate that route and give vacations, and so forth.

Coming at it another way, as to time, if a pilot gets a two weeks' vacation for which he is not required to fly additional time when he gets back for

(Testimony of A. W. Stephenson.)

that month, there is no way in the world that you can average much over 80 hours per month.

Q. Western Air Lines transferred four DC-4 airplanes with the transfer of the route, did they not? A. They did.

Q. Were those planes replaced in Western's operation?

A. Not for a considerable time.

Q. How long a period of time before there was any additional equipment acquired by Western to replace these DC-4's? A. About a year.

Q. And at that time what planes were acquired by Western—what new equipment?

A. CS-240's, Convairs.

Q. How were they placed in operation?

A. We received our first airplane in June, about June of 1948; started our training program at Ardmore, Okla. That involved captains and co-pilots, and the training was done at Ardmore, and the airplanes were prepared for carrier service, and the operation, I believe, was started in August with one trip.

Q. August of 1948?

A. That is right. 1948.

Q. How were the balance of the planes placed in [2097] operation?

A. They were placed in operation over a period of several months. The original plane was to have the operations going in about December of 1948. Actually we didn't get around to a Convair on every

(Testimony of A. W. Stephenson.)

flight until I believe the spring of 1949. That was our goal, a Convair on every flight.

Q. Now, turning to page 2 of the exhibit, and calling your attention to pages 2, 3, 4, 5, 6, and 7 of that exhibit, having to do with the statements of the pilots regarding their employment subsequent to the sale of Route 68, are you prepared to state, Mr. Stephenson, that those are true and correct statements of the manner in which their employment was affected on the dates that are indicated in the statement? A. I am.

Q. Is it a true and correct statement?

A. It is, to the best of my knowledge and belief.

Q. I believe you stated you had the records of the different bids and assignments of all of these pilots that were either furnished you by the company or gotten from the company at the time that these assignments and bids were awarded; is that right?

A. That is true. Sometimes, in the case of the junior pilot, he didn't even rate a place on the list, and it was automatically understood what his position was.

Q. And you kept track of the movement of these pilots, in your capacity as Council chairman of the Air Line Pilots Association, and the senior pilot on the line? [2098] A. That is right.

Q. Now, calling your attention to page 8 of the exhibit, which translates these losses into dollars and cents, will you kindly tell us how it was accomplished?

(Testimony of A. W. Stephenson.)

A. That was accomplished by myself and the individuals taking the records that he and I had, and checking dates and periods of time for which we were—in which we were interested, to make up a statement of such a loss, or such an effect.

Q. And then you and he computed it at that time? A. That is right.

Q. I see some of these pilots did not compute their loss, and said “not estimated.” Why was that done?

A. Because the individual didn't have enough information on himself as to what his pay checks or monthly flying hours had been. And for that reason neither one of us felt a definite commitment as to any specific sum would be in order. We didn't think it was proper. We couldn't state what it was.

However, on that there are instances where individuals, had they had their records, could have made it. It could have been very easily calculated.

Mr. Bennett: You may cross-examine.

Examiner Wrenn: Mr. Crawford, do you have any questions of the witness?

Mr. Crawford: None.

Examiner Wrenn: Mr. Renda, you may examine the witness. [2099]

Cross-Examination

By Mr. Renda:

Q. Mr. Stephenson, do I understand your testimony to be that the only adverse effect resulting

(Testimony of A. W. Stephenson.)

from your being transferred from Route 68 to Route 63 is measured in dollars and cents?

A. No.

Q. In your particular case?

A. No. I don't measure it in dollars and cents.

Q. You are No. 3 on the seniority list, are you not?

A. That is right.

Q. There is no one higher than you who is on active flying status; is that correct?

A. Right.

Q. So you can bid and obtain the privilege of flying on any run, the most lucrative run that Western may have; is that correct?

A. That is right.

Q. Now, you testified that the only loss sustained was one of approximately \$175 due to loss of flying time, as you were qualifying on Route 63?

A. No, I did not.

Q. What is your testimony as to loss in dollars and cents?

A. I testified that I lost \$175 qualifying and as a result of qualifying and preparing all pilots was an additional \$1,350.

Q. All right, I will ask you to state what were your total earnings received from Western Air Lines in 1946?

A. Well, I am not prepared to give that. [2100]
I don't have my—

Q. If I were to tell you that in 1946 you were paid and earned \$11,383.13, would you dispute that?

A. No, I don't think so.

(Testimony of A. W. Stephenson.)

Would you explain to me whether that was what I was paid that year, or what I earned?

Q. That is what you earned, and included the retroactive pay adjustment.

A. I think that is a good enough figure.

Q. Do you recall what your earnings were in 1947? A. They were more than that.

Q. If I were to tell you that in 1947 you earned \$12,382.22, would you dispute that figure?

A. No.

Q. Do you recall what your earnings were in 1948 after the sale of Route 68?

A. Do you have a figure on it?

Q. If I were to tell you that figure was \$12,-517.45, would you dispute that figure?

A. No.

Q. So wherein lies the adverse effect in dollars and cents in your particular case before and after Route 68 was sold?

A. Because it is only—it was 1948 before we got back to a basis of getting full advantage for night flying on Route 63.

Q. Well, now, you testified, Mr. Stephenson, that you sustained a loss of approximately \$150 in pay per month for a period of between eight and nine months following the sale [2101] of Route 68; is that right?

A. I believe the figure was \$175, wasn't it?

Q. I have \$150. I stand corrected if that was not right. Let's make it \$175. The record will show the correct figure. But you testified to that effect.

(Testimony of A. W. Stephenson.)

A. May I have the question again?

Q. That you sustained a loss in dollars and cents of approximately \$150—or \$175, if you will—in each and every month for nine months following the sale of Route 68.

A. Just a minute. That is a different thing.

Q. Well, will you answer my question? Did you or did you not?

A. May I have the question now?

Examiner Wrenn: Read the question again.

(The question was read.)

The Witness: That figure was \$150 a month.

Q. (By Mr. Renda): That is what I thought. Now, will you answer the question?

A. I am sorry. I sustained that loss not getting full advantage of full night flying time until 1948. I don't remember the exact dates, or anything else.

Q. How long did you hold the position of Master Councilman for Western's A.L.P.A.?

A. 1948. And as assistant to the Master Councilman in 1947.

Q. I assume in that capacity you are more than thoroughly familiar with the terms and provisions of the contracts that have been in effect between Air Lines and [2102] A.L.P.A.

A. I wouldn't use the statement "more than thoroughly." I have a copy of it, and I know the intent of a lot of it and what it means.

Q. I presume you men knew in September, 1947, or any time prior thereto, that if the sale of Route 68 was approved you would have to qualify on another route?

(Testimony of A. W. Stephenson.)

A. If the pilots were not transferred with the route, yes.

Q. Now, what is your claim in this proceeding, Mr. Stephenson? Are you seeking monetary compensation for the dollars and cents sustained; is that your position? A. No.

Mr. Bennett: I think that question is not a proper question. I think our position is set forth completely in our statement and in our exhibits.

Mr. Renda: I know the position of the A.L.P.A., Mr. Examiner. I want Mr. Stephenson's position.

Examiner Wrenn: Then why all of this testimony as to the amount of damage this particular pilot sustained?

Mr. Bennett: The answer to that, Mr. Wrenn, is this: The issue in this case is how is a man damaged. You can only show damages in one of two fashions, either a monetary loss—and any loss in a situation of this character boils down to money—a loss of seniority, a loss of working conditions, is all measured in money, because if a man's seniority goes backwards his ability to earn also goes backwards.

Examiner Wrenn: Yes, but I understand you took the position originally—I have looked back at your pleadings [2103] here, and your testimony originally that the pilots should go with the route. At that time that was your position and that is still your position. Now, I don't see what bearing what Captain Stephenson's loss here, and so forth, in showing adverse effect, has to do with that. Your

(Testimony of A. W. Stephenson.)

position is that the pilots should go with the route.

Mr. Bennett: It still is our position, but how can we show damage without showing loss of seniority. This man was No. 1 on the list. Obviously, his seniority couldn't be affected under——

Examiner Wrenn: I understood him to say that he had a considerable monetary loss here.

Mr. Bennett: That is right.

Examiner Wrenn: Suppose the Board says, "All right, we will agree with your statement here that the pilots should go with the routes, and we will impose the condition that the pilots should go with the route."

Now, what is the position here of Captain Stephenson on his \$1,350, and Mr. Kennedy here on his \$3,160, and all these others listed here in Exhibit No. 1?

Mr. Bennett: Are you saying you want the man to answer the question, Mr. Examiner?

Examiner Wrenn: I want to know the position here. The question was addressed to him as to his particular position, and you interposed an objection that it isn't germane.

Mr. Bennett: I withdraw the objection.

You may answer, Mr. Stephenson.

The Witness: May I have the question again?

Examiner Wrenn: Read the question, Mr. Reporter. [2104]

(The question was read.)

Examiner Wrenn: Are you directing that question personally to Captain Stephenson?

(Testimony of A. W. Stephenson.)

Mr. Renda: Yes.

Q. (By Mr. Renda): Do I understand the Board should find that there has been an adverse effect, and that they should attach a condition—the transfer of you as a former pilot on Route 68 to United Air Lines, and that you would not seek to recover any claim in dollars and cents against Western for this past period?

A. For the items mentioned here, no.

Q. And do you agree with the statement made by your counsel that adverse effect can only be measured in terms of——

Mr. Bennett: I didn't say that. I said dollars and——

Mr. Renda: I will reframe the question.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Would you agree with me that adverse effect can only be measured in terms of dollars and cents?

A. No. I would agree with you that it is the only way that you can express—the principal way that you can express adverse effect.

Q. All right. If there is any other way that you can evaluate adverse effect in this particular case, and with respect to your particular case, other than dollars and cents, please state it. What are they?

Or to state it differently, how were you adversely [2105] affected in any other way according to your own testimony than in your pay envelope?

A. I was adversely affected in this way: When

(Testimony of A. W. Stephenson.)

we started flying Route 68 we started it with DC-4's. The company had DC-6's on order. We expected to be eventually flying that route with DC-6's. That is considered a step up in the pay bracket, and a step up in pilot qualification—heavier aircraft, faster aircraft. That is something that for 33 years I have always been striving to do—to become a better pilot.

Q. Mr. Stephenson, under the terms of **this contract** between pilots represented by A.L.P.A. and Western Air Lines, is it not the prerogative of management to determine what type of aircraft it wants to fly on its routes?

Mr. Bennett: I suggest, Mr. Examiner, if the contract provision provides that the contract will speak for itself. I think the contract is even a part of the record of this case.

Mr. Reilly: I support that question, Mr. Examiner, because I am going to ask this witness some questions, and I would like a ruling on Mr. Renda's question.

Examiner Wrenn: What is your objection?

Mr. Bennett: The contract speaks for itself. If the contract makes that provision, then so be it.

Examiner Wrenn: Can you state whether that provision is in the contract? That is what I want to know.

Mr. Bennett: What provision? The one he is talking about? He should know whether it is in there or not. I don't know what is in there in each detail. [2106]

(Testimony of A. W. Stephenson.)

Mr. Renda: In order to simplify this, may I withdraw that question and ask a new question?

Examiner Wrenn: All right.

Q. (By Mr. Renda): Do you contend that the employees of Western Air Lines, even those represented by A.L.P.A., have any right to tell management what type of aircraft to fly on its routes?

A. Certainly not.

Q. So if management chose not to use DC-6's and chose to fly Convairs, that is within management's own right?

A. That is right.

Q. And if you choose not to fly DC-6's and wanted to fly Convairs, that is your prerogative.

A. That is right.

Q. You are not held to any agreement to have to work for Western?

A. That is right.

Q. What are some of the other instances of adverse effects that you can evaluate in other than dollars and cents?

A. Any pilot knows that it is a step backwards for a man to be flying as captain on the lefthand side of an airplane, being in control of an airplane, in charge of the flight, and have to move over to the righthand side and be the second in command. It is a step backwards to the individual.

Q. Did that happen to you, Mr. Stephenson?

A. It didn't happen to me, no.

Q. I am asking you only with regard to your particular case.

A. You didn't ask that question. [2107]

(Testimony of A. W. Stephenson.)

Q. I am now, then. Let's confine it to your particular case for the time being.

A. May I have your question repeated?

Q. The question is: If as you claim you cannot just evaluate adverse effect in dollars and cents, I want to know what those others are that don't result in a dollars and cents adjustment.

Examiner Wrenn: Are you talking about Captain Stephenson?

Q. (By Mr. Renda): Just Captain Stephenson.

A. In measuring this particular case, and in the way it was handled with no transfer, it puts me in the position of wondering how long my job is going to last. There is an adverse effect on any individual when he begins to wonder how long he is going to be able to continue to fly even Convairs.

Q. Now, you know that there is no issue involved that your job was at any time placed in jeopardy. You are protected under the contract to exercise your seniority; is that right? A. Oh, yes.

Q. So there was at no time jeopardy?

A. Well, if you set up a precedent, and if you sold 63, it would be in jeopardy.

Q. Well, we are not getting into the realm of speculation. Let's keep this to Route 68. That is bad enough. As long as you are qualified to fly, you are protected under the terms of your contract?

A. As long as Western Air Lines has a route to operate, [2108] yes.

Q. That is true. That goes without saying. So

(Testimony of A. W. Stephenson.)

that that point as to adverse effect we will pass for the time being.

Are there any other factors?

A. Offhand, in my case, I don't think so.

Examiner Wrenn: Let us recess until 2 o'clock this afternoon.

(Whereupon, at 12:35 p.m., a recess was taken until 2 p.m. of the same day.) [2109]

Afternoon Session—2:00 P.M.

Examiner Wrenn: All right, gentlemen, may I have your attention?

You may continue with the cross-examination of the witness, Mr. Renda.

Whereupon,

W. A. STEPHENSON

resumed the witness stand, and was examined and testified as follows:

Cross-Examination

(Continued)

By Mr. Renda:

Q. Mr. Stephenson, the 14 crews who were flying Route 68, by exercising their seniority rights under the contract, are they now most of them flying Route 63?

A. Most of them, yes.

Q. And pilots who fly Route 63 are based where?

A. Los Angeles.

Q. And the operation is an operation from Los

(Testimony of A. W. Stephenson.)

Angeles to Seattle with a turnaround at Seattle; is that correct?

A. And also a turnaround at San Francisco.

Q. Well, that is true. Let us break it down. The shuttle trips between Los Angeles and San Francisco turn around at San Francisco? A. Yes.

Q. But the Los Angeles-Seattle flights turn around at Seattle. That is where the pilot lays over? A. That is right.

Q. Los Angeles is also the base for the pilots who are flying the Denver route; is that [2110] correct? A. That is correct.

Q. And the extension of Route 63 from San Francisco to Seattle is operated actually as a through flight from Los Angeles to Seattle?

A. The extension is operated that way.

Q. In other words, it is an adjunct?

A. That is right.

Q. There are no crews based at San Francisco, and there are no crews based at Seattle. The flights are—— A. That is right.

Q. Now, you mentioned four airplanes having been sold to United Air Lines and there not having been any replacement in equipment for a considerable time thereafter. Do you know what was our experience with respect to utilization of DC-4 aircraft in October, 1947?

A. I don't have the figures on utilization. They are available here in C.A.B. records.

Q. Do you know what was the experience in the

(Testimony of A. W. Stephenson.)

industry for utilization of DC-4 aircraft in September of 1947? A. No, I don't, sir.

Q. Or October of 1947?

A. No, because that is a public record.

Q. Do you know whether the utilization of DC-4 aircraft by Western was substantially greater than the industry average, or less?

A. I would be inclined to think it was very good after September of 1947.

Q. Now, will you please turn to your Exhibit No. 1—excuse me, A.L.P.A. Exhibit No. 1 which you are sponsoring. [2111] The information set forth in this exhibit is information which you have within your own knowledge; is that correct?

A. That is right, and the sworn statement of the individuals.

Q. Now, the sworn statements you refer to, are they the affidavits that copies of which were submitted to the Board by letter addressed to Mr. Thomas L. Wrenn, Assistant Chief Examiner, dated November 14, 1948?

A. If I could see them——

Q. Yes. A. Yes.

Q. Where were these affidavits which you have now notified, where were they prepared?

A. The original affidavit was made in Los Angeles.

Q. Did all these men that you have affidavits for in your possession, did they all come to Los Angeles and did you confer with them in Los Angeles?

A. They were all in Los Angeles.

(Testimony of A. W. Stephenson.)

Q. Did all of them live in Los Angeles?

A. They did at that time.

Q. That is what I had reference to Mr. Stephenson, was at that time.

And the affidavits were prepared in Los Angeles, signed by the various affiants in Los Angeles, and notarized by Mr. Bennett in Los Angeles; is that correct?

A. The original affidavit was made in Mr. Bennett's handwriting. He wrote the affidavit. The individual signed it, and it was notarized, and these are copies of the original affidavit typed and properly signed and executed. [2112]

Q. I just wanted to ascertain if all this was done in Los Angeles? A. That is right.

Q. The preparation of the affidavit, the signature of the affiant, and the notarization?

Mr. Bennett: I might clear that up. I was in Los Angeles. I did have the affidavits in longhand, and every man signed it. Then I took the affidavit back to Chicago and they were redrafted on the typewriter and were forwarded out to Los Angeles for signature. They are a duplicate of the longhand one, and that is the manner in which they were executed.

Q. (By Mr. Renda): You will notice on the first page of your exhibit you have indicated the salaries for DC-4 captains and DC-3 captains. Will you please tell us what would be the earnings of a captain with eight years' seniority flying 40 daylight hours and 40 nighttime hours in a given month

(Testimony of A. W. Stephenson.)

on Convair equipment? Those are the same conditions you took into consideration in arriving at the salary of a DC-4 captain.

A. It would be approximately \$40 less on the Convair.

Q. Forty dollars less on the Convair than it would be on the DC-4? A. That is right.

Q. Now, you will notice in the last paragraph of page 1, about the sixth line, you refer to the company discharging some twenty-odd pilots.

A. Twenty-three pilots were removed from the payroll.

Q. Yes. Those pilots that you referred to were the [2113] pilots that were mentioned in the letter from Mr. J. L. Thayer, Chief Pilot for Western Air Lines, to all pilots, dated September 4, 1947; is that correct?

A. There were pilots mentioned in one letter dated that day.

Q. Yes. And you recall the names of those pilots, do you?

A. If I had a copy of the letter. I can't remember 23 names just offhand.

Mr. Bennett: Do you want me to hand him a copy?

Mr. Renda: Yes, if you have a copy handy.

Mr. Bennett: Yes, I think I have a copy of it.

Q. (By Mr. Renda): First, let's take Mr. Babcock—

Examiner Wrenn: Is that the letter that is contained in Western's Exhibit W-8, Mr. Renda?

(Testimony of A. W. Stephenson.)

Mr. Renda: Yes, Mr. Examiner. Since I have not had our exhibits identified, I refrained from referring to it at this time.

Examiner Wrenn: All right.

Q. (By Mr. Renda): Do you know when Mr. Babcock was first employed by Western Air Lines?

A. I have the figures on it. Yes, I believe I have a copy of the notice from the Chief Pilot of his first flight, and so forth. I don't have it in front of me.

Q. Do you have that information with you?

A. I have it with me, yes.

Q. Do you have information with respect to all the [2114] pilots mentioned in this letter that I have referred to, as to date of employment, and times during which they were furloughed between 1946 and 1948?

A. I don't have all of the individual records of when they were on and off the payroll. The individuals themselves have. I have some of it, particularly pertinent to these affidavits.

Q. Have you examined Western Air Lines Exhibit No. WR-1—

Which, Mr. Examiner, of course, has not yet been marked for identification at this time.

Have you examined that exhibit?

A. Not too closely, no.

Q. But you have examined it?

A. No, not closely.

Q. I direct your attention to the remarks opposite Mr. Babcock's name. You will notice he was

(Testimony of A. W. Stephenson.)

recalled May 1, 1948. Do you know what date he was furloughed?

A. You have the statement here that it was September 21, 1948. I would assume that is probably correct.

Q. Do you know when he was furloughed in 1947? A. Well, this letter——

Q. That would be pursuant to this letter, wouldn't it? A. Yes.

Q. Do you know when he was called to active flying duty in 1947?

A. As I said, that might have been his original report to duty.

Q. Isn't it a fact that he was hired for the first time [2115] on May 1, 1948?

A. What was that?

Mr. Bennett: You mean 1947?

Q. (By Mr. Renda): May 1, 1947.

A. I can check it with the record I have and answer that question. I don't have all the Mays of that information. If you are inquiring as to that I would like to have use of my own records.

Q. Do you know if he is flying at the present time for Western Air Lines? A. No, I don't.

Q. Is it a fact that he was recalled on June 1, 1949, and is presently in our employ?

A. If he was recalled, then he is no doubt working now.

Q. You have investigated all these cases, I presume?

(Testimony of A. W. Stephenson.)

A. I did at the time this—pertaining to this exhibit?

Q. Pertaining to these pilots that were furloughed pursuant to letter dated September 4, 1947.

A. I did investigate, get the story as to what happened on that date. And the years '47 and '48.

Q. I invite your attention to the second pilot listed, Howard Critchell. You will notice he was hired June 23, 1947, furloughed September 18, 1947, was rehired on September 1, 1948, as a crew scheduler. Do you know what his present status is?

A. He is flying now. [2116]

Q. And do you know since what date?

A. Well, he dropped his duties as crew scheduler in the spring some time, and went back to flying.

Q. Mr. Critchell was hired subsequent to the hearing in the Route 68 case; is that correct?

A. Yes.

Q. Let's look at Mr. Donald R. Edgerton.

A. Before I go further in this—

Mr. Bennett: Just a minute, please.

Examiner Wrenn: All right.

Mr. Bennett: I don't think this is proper cross-examination. The only direct examination was that twenty-odd pilots were released from the seniority list. And I don't think it is a proper cross-examination at this time to require Mr. Stephenson to sponsor Western's exhibit. In its proper order, I take it, Western will sponsor its own exhibit.

Examiner Wrenn: I agree with you it isn't

(Testimony of A. W. Stephenson.)

proper for the witness to sponsor the exhibit, but he is not sponsoring the exhibit——

Mr. Bennett: Well, to put in Western's case. If they want to call Mr. Stephenson at the proper time, we have no objection to that. But the point I make is that it is not proper cross-examination. We didn't indicate what pilots, or whether they were hired afterwards or rehired or furloughed or employed afterwards. We submit this is not proper cross-examination.

I object to this line of questioning.

Mr. Reilly: Mr. Examiner, this witness has put in here a [2117] letter from Western Air Lines to all pilots. He says he has investigated them all as of the date of the exhibit. That exhibit is dated sometime in June, 1949. Mr. Renda is asking questions with respect to the validity of the testimony of Mr. Stephenson. He has already asked him about certain pilots and we think it is highly proper to——

Mr. Bennett: On the contrary, he has discussed a pilot here who was not on the payroll at that time.

Examiner Wrenn: You don't have any objection, if Mr. Renda says he is going to call this witness as his witness, to him asking the questions, do you?

Mr. Bennett: No, at the proper time.

Mr. Renda: What is wrong with now?

Mr. Bennett: All right.

Mr. Renda: There will be a witness to sponsor

(Testimony of A. W. Stephenson.)

our exhibit, but I think it is proper for me to cross-examine Mr. Stephenson, who sponsored Exhibit No. 1 and said there were twenty-odd pilots discharged in September, 1947——

Examiner Wrenn: He has agreed with you that the twenty you are talking about are those listed in Western's Exhibit No. 8.

Mr. Renda: Yes.

Mr. Bennett: That those are the same pilots.

Mr. Renda: I have asked him about Mr. Critchell and Mr. Babcock——

Examiner Wrenn: I don't want Captain Stephenson to sponsor something now that he hasn't testified to.

The Witness: I am perfectly willing to check my records and check this list against them and answer your questions. [2118]

Mr. Reilly: That is the purpose of rebuttal exhibits. He should have checked them before he came here.

Mr. Bennett: You mean to sponsor the exhibit?

Mr. Reilly: We are talking about checking the exhibits.

Examiner Wrenn: All right, let's go ahead.

The Witness: I am prepared to check my records against this and appear as a witness for Western, or anybody else, to go through it. But I don't see how I can be expected to agree to mass of information here as to dates of individuals without being permitted to check my records.

Examiner Wrenn: Well, of course, their ques-

(Testimony of A. W. Stephenson.)

tion now is: You had access to them, and why have you not had an opportunity to check them until now?

The Witness: The records I had access to were the original hiring dates of the individual, letters on which he might have been furloughed. I never received any letter from the company as to the date the man was told to report back to duty. He became of interest to us when he was back on the payroll.

Examiner Wrenn: Well, do you have your data with you?

The Witness: Yes, sir. But it would take some time to check it across.

Mr. Reilly: May I ask the witness a question because we are talking about——

Examiner Wrenn: All right.

Mr. Reilly: Have you ever seen Western's rebuttal Exhibit No. 1 before today, Mr. Stephenson?

The Witness: I have seen it, but I have never——

Mr. Reilly: You never thought it important enough to [2119] check those figures until now?

The Witness: I never had time to check all those figures.

Mr. Reilly: Why did you come to the hearing if you did not have time to have them checked?

Mr. Bennett: I will object to that.

You came here as a witness on behalf of A.L.P.A.?

The Witness: That is right.

(Testimony of A. W. Stephenson.)

Mr. Bennett: Did you come here to sponsor this exhibit?

Examiner Wrenn: All right, now, let's not have any talk about sponsoring the exhibit. It is clearly understood that this witness is not sponsoring this exhibit.

Mr. Renda: Definitely. As much as Mr. Stephenson wants to sponsor it for Western, we will have our own witness. But the purpose of my cross-examination, and I am going to have a lot of it——

Examiner Wrenn: Insofar as it relates to those 20 people that he testified about that have been furloughed, go ahead.

Mr. Renda: All right, Mr. Examiner.

Q. (By Mr. Renda): I direct your attention to a pilot named D. R. Edgerton. You will note he was hired for the first time June 30, 1947. That was subsequent to the hearing in the Route 68 case, is that correct? A. Right.

Q. And he was furloughed September 19, 1947, pursuant to letter of September 4. He was recalled on June 28, 1948, [2120] furloughed again August 31, 1948. Do you question any of that information?

A. No, I don't question it. Neither do I affirm it.

Q. Do you know whether or not he was flying between June 28, 1948, and August 31, 1948?

A. I am pretty sure from—just answering without checking the records, I am pretty sure that he did, yes.

Q. Why was he furloughed August 31, 1948?

A. Because that is the—I would assume that

(Testimony of A. W. Stephenson.)

that is the time that the Yellowstone schedules, summer schedules, were being reduced.

Q. Due to schedule cut-backs, in other words?

A. That is right.

Q. Doesn't that happen every year with Western? In other words, don't winter schedules go into effect varying on the exact date, but some time in the fall, either September or October?

A. It did every year except 1946.

Q. And in 1946 when did winter schedules go into effect?

A. The winter schedules went into effect when winter came, but there was no reduction until November of 1946.

Q. In other words, the period was just 30 days later than had been the practice in other years?

A. Well, what I mean is that Western was putting on schedules in October of 1946 rather than reducing. October and November.

Q. Well, Mr. Stephenson, what happens to pilots when there is a change in schedules at the end of the summer [2121] season and the schedules for the summer season are reduced from those that were in effect previously?

A. The pilots flying reserve—the reserve captains flying temporary runs go back to reserve captain at their bases. Senior pilots go back on the permanent runs and reduce co-pilots, and at the bottom of the list men are laid off, reduced.

Q. Furloughed? A. Furloughed.

Q. Doesn't this cycle occur every year?

(Testimony of A. W. Stephenson.)

A. It did, except for 1946.

Examiner Wrenn: Are those individuals recalled to employment then when the summer schedules are put on again, if they are available?

The Witness: If they are available and needed. It depends on the number—the next season's schedules might be different.

Examiner Wrenn: Oh, I understand that.

Q. (By Mr. Renda): Was not that the same situation that existed in 1947 that brought about the furloughing of the 23 pilots mentioned in the September 4, 1947, letter?

A. Will you repeat the question?

Examiner Wrenn: Read it back to him, please.

(The question was read.)

The Witness: No. It was partially, but not completely.

Q. (By Mr. Renda): Well, now, let's look at Mr. Critchell. You will [2122] notice the pattern there is one of being hired in the spring, furloughed in the fall, recalled in the spring. The same is true of Mr. Edgerton. The same is true of Mr. Fitzgerald; is that correct?

A. Except that he didn't come back.

Q. Well, that was of his own choosing.

Examine Mr. F. J. Flynn and see if you don't have the same pattern there.

A. According to this it has.

Q. Do you question the accuracy of the information?

(Testimony of A. W. Stephenson.)

A. Yes. Mr. Flynn is a case of what I mentioned in 1946. The reason the curtailment was not—the first of December rather than the September and August 31 curtailment.

Q. Yes, but he was recalled in the spring of 1947, furloughed in the fall of 1947, recalled in January of 1948, and was again recalled this year on April 1, 1949. Isn't that the same pattern as exists with respect to the other pilots we have discussed up to this time? A. Yes.

Q. Let's examine Mr. Allen F. Funkey. Is it not true that with Mr. Funkey it is a case of being hired in the spring of 1946, furloughed in the fall of 1946, rehired in the spring of 1947, furloughed in the fall of 1947, recalled in the spring of 1948, furloughed in the fall of 1948?

A. Except that it wasn't the fall. It was in the winter, December 4.

Q. Well, I stand corrected in that respect. December 4. The winter started December [2123] 23d—

Examiner Wrenn: Are these individuals here in this W-R-1, the individuals mentioned in the letter of September 4?

Mr. Renda: Each one.

Examiner Wrenn: Rather than go into each case here, isn't it possible to find out whether Captain Stephenson has any disagreement with the facts set forth here?

I see the pattern of the argument you are making here, and you can make it just as well unless he

(Testimony of A. W. Stephenson.)

disagrees with that, that this is a correct statement of the employment record of those men.

Mr. Bennett: If counsel present a witness who says that this is a true and correct recitation of the employment of these individuals, I don't see how we could dispute it, so then let it be.

Examiner Wrenn: I assume he is going to do so. My only question is who is the appropriate witness in Western to do it, whether someone in the employment office is the proper witness or whether Captain Stephenson is.

Mr. Bennett: That goes to the crux of my first objection, Mr. Wrenn. Mr. Stephenson says he doesn't know. If that is what the record is, so be it, and that is what he has testified to all through this.

Mr. Renda: As I indicated previously, Mr. Examiner, we will have a witness who will sponsor this exhibit and other exhibits. We are not in disagreement in that respect. The questions I have asked Mr. Stephenson up to this time with respect to this information is preliminary from my ascertaining from him as to why these various parties, 23 all told, [2124] mention in Exhibit W-8, which is the September 4, 1947, letter, were furloughed on September 18, 1947, and—as is perhaps obvious by my question so far—why they were furloughed in September and October, 1948, and why in September and October, 1946?

Unless I can ascertain from him first as to whether he has any question as to the information,

(Testimony of A. W. Stephenson.)

I don't see that it would be appropriate to ask him the other questions.

Examiner Wrenn: My question is whether Captain Stephenson has any disagreement with the information. If he is willing to accept it as factually correct, I think we can go ahead.

Mr. Renda: Let me put this question to him, Mr. Examiner.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Mr. Stephenson, set forth in Exhibit W-R-1 is factual information obtained from the payroll records of Western Air Lines dealing with the employment status of the various pilots mentioned in the September 4 letter. Will you be willing to accept that information as correct, subject to check, for the time being?

Mr. Bennett: Are you testifying now? I don't understand.

Examiner Wrenn: He asked a question.

Mr. Renda: I am trying to avoid a question on each and every one of these cases.

Mr. Bennett: If you know.

The Witness: From my brief acquaintance with it, I [2125] would say that it is reasonably accurate. There might be minor errors as to dates or status, but the statement opposite the individual's name apparently is reasonably accurate.

Examiner Wrenn: I want you to be clear on that, Captain Stephenson. You are not sponsoring this, and he is not introducing this through you.

(Testimony of A. W. Stephenson.)

You understand that and he understands that. So go ahead.

Q. (By Mr. Renda): On the basis of your reply to my previous question, I invite your attention to the fact that of the 23 pilots listed in the September 4 letter, and in Exhibit W-R-1, seven of them were hired subsequent to the sale—excuse me—subsequent to the hearing in the sale of the Route 68 case. Is it your position that those pilots were adversely affected by reason of the sale of Route 68?

A. Yes.

Q. What was the nature of their employment, if you know, at the time they were hired subsequent—

A. Co-pilot.

Q. In your opinion, was it temporary?

A. No. It shouldn't have been.

Q. Well, now, I invite your attention to the fact that of the 23 pilots listed 13 were furloughed in the fall of 1946, recalled in the spring of 1947—or some approximate date thereto—furloughed in the fall of 1947 and recalled in the spring of 1948.

Now, there was no sale of Route 68 in the fall of 1946 or the fall of 1948. How do you explain them being furloughed [2126] at those dates?

A. At what dates?

Q. The fall of 1946 and fall of 1948.

A. The fall of 1946, in October, 1946, we were built up to seven round trips over Route 68. We never operated consistently for any length of time at all more than six, but we built up crews, supposedly, and the company advertised for permanent

(Testimony of A. W. Stephenson.)

bids for 21 captains, and necessarily it would take 21 co-pilots to make up the crews. The original bid was for 26 captains, and as our experience on the route developed we were able to reduce the flying time and the figure of 21 crews was finally established as the permanent basis.

Q. Mr. Stephenson, that doesn't answer my question, but——

Mr. Bennett: I submit it does answer the question.

Examiner Wrenn: Let him finish his statement.

Go ahead, Mr. Renda. You started to say something.

Mr. Bennett: Yes, go ahead. I am sorry. I wanted the record to show, though, that in my opinion he answered the question.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Isn't it a fact that pilots were furloughed in September, 1948, and September, 1946, due to the usual schedule cut-backs brought about by the change of schedules?

A. Yes.

Q. Isn't it a fact that that happened in September, 1947? [2127]

A. There were some, yes, but not all of these 23 by any means.

Q. Well, how many?

A. Oh, approximately four or five.

Q. Do you know how many pilots were furloughed in September, 1948?

A. No, I don't, not offhand.

(Testimony of A. W. Stephenson.)

Q. Why were pilots furloughed in September or October, 1946?

A. Discontinuance of Denver schedules.

Q. How many schedules were being operated in September, 1946?

A. Four. I believe the fifth one was put on in September.

Q. How many were operated in October?

A. Six—five.

Q. How many in November?

A. The date at which they were bulletined to be scheduled, and the date on which they actually occurred, there is a variation. But there was actually set up to be seven schedules so far as flight crews were concerned, but the seventh was not operated very long.

Q. Mr. Stephenson, I am not interested in knowing what was set up. I am interested in knowing what was actually operated.

A. Seven, for a period of time.

Q. I invite your attention to A.L.P.A. Exhibit 16. You will note the schedules reported as being operated in 1946. [2128]

Mr. Bennett: Just a minute.

Mr. Wrenn, I am going to object to this as not being proper cross-examination. We have a witness to sponsor Exhibit 16 and he will follow this witness. He may be cross-examined, triple examined, and howsoever examined. This is not proper cross-examination of this witness. We didn't

(Testimony of A. W. Stephenson.)

go into this previously, and I am objecting to this line of cross-examination.

Examiner Wrenn: Well, I am going to overrule your objection there. If it is in that particular exhibit, I am not concerned with that. Maybe Mr. Renda will start over with his general questions. As I understand it, he wants Captain Stephenson to tell us how many schedules you operated at that time, and wherever he gets it I presume that is satisfactory.

Mr. Bennett: All right. He already answered the question once, if I understand.

Examiner Wrenn: What is the state of the record on it?

(The record was read.)

Examiner Wrenn: All right, Mr. Renda.

Mr. Renda: I would like to indicate at this time, Mr. Examiner, that Mr. Stephenson is sponsoring an exhibit at this time that deals with information purported to demonstrate a typical case. I have a right to cross-examine him and ascertain the correct details.

Examiner Wrenn: All right. Proceed.

Q. (By Mr. Renda): Have you compared that with Exhibit 1? A. Yes. [2129]

Q. Do you find how many schedules there are listed in there? A. Yes.

Q. Do you want to correct your previous testimony? A. I do not.

Q. Then please explain.

(Testimony of A. W. Stephenson.)

Mr. Bennett: Then explain what? You mean the difference in his testimony and the exhibit; is that what you mean?

Mr. Renda: The question speaks for itself.

Mr. Bennett: If that is what you mean I object to it. He is not sponsoring that exhibit.

Examiner Wrenn: I sustain your objection on that. He can explain his testimony of seven, what he based it on.

The Witness: Because there could easily be a discrepancy between the figure—this exhibit was based on C.A.B. reports——

Mr. Reilly: It is not based on C.A.B. reports at all. If you look at the bottom of the exhibit it says "Source," and you can see none of those are sources of the C.A.B.

Examiner Wrenn: Go ahead and answer, Captain Stephenson.

The Witness: I stand corrected.

But we operated, or started to operate, the seventh schedule with a schedule number. Crews were qualified and assigned to the runs. In November of 1946 we had an early winter season with a considerable amount of snow and bad weather, and an immediate cut-back was started. And whether that schedule was flown or not, or on the books for more than 15 days, I don't know. I do know of the sixth. But I [2130] know we were prepared and expected to fly seven.

Q. (By Mr. Renda): I repeat, all I want to know is did they fly or did they not fly, and operate

(Testimony of A. W. Stephenson.)

a seventh schedule. I don't care what was on the drawing boards.

A. I repeat my testimony.

Q. And you answer my question?

A. That is my answer to the question.

Examiner Wrenn: Well, were they flown, Captain, or not?

The Witness: They are on the books. Whether they were on the airways' guide, or not, I don't know.

Examiner Wrenn: Do you know whether crews actually took the schedule out and operated it, or not?

The Witness: I would have to check the records on that, sir.

Examiner Wrenn: Your present answer is subject to checking; you couldn't say definitely one way or the other?

The Witness: About the seventh trip.

Examiner Wrenn: All right.

Q. (By Mr. Renda): Going back to September 15, 1947, you are familiar with the decrease in schedules that were made by Western, effective that date?

A. That is right.

Q. Were not all 23 pilots listed in the September 4 letter affected as a result of the schedule reduction?

A. Of September 15?

Q. Yes.

A. No. The original effect was the reduction of [2131] Denver schedules, taking two schedules off Denver in order to operate Route 63 the first of August when that went into operation. And on

(Testimony of A. W. Stephenson.)

August 31 a Yellowstone schedule was taken off. And actually on September 4 we had an excess of pilots—or, rather, on the 15th when the final Denver schedule was dropped was when the reduction was began to be felt by the Los Angeles base.

Q. Now, let us consider the different pilots mentioned in this September 4 letter. Name for me those who were flying Route 68.

A. I can't do that, because in the first place co-pilots in this——

Mr. Bennett: The September 4 letter, you say? I think he is confused. He is looking at——

Examiner Wrenn: Take your time, Captain. Read the question to him again.

(The question was read.)

The Witness: Well, I can add one.

Q. (By Mr. Renda): What is his name?

A. Hongola.

Q. Who else?

A. I couldn't commit myself to any others just now.

Q. Isn't it a fact that pilots were flying on Route 68 after the transfer and continued in their employment, and none of them by reason of their high standing on the seniority list lost any time?

A. No. This Hongola lost time.

Q. How much time did he lose? [2132]

A. Well, he was furloughed—not immediately, but within a very short period.

Q. Do you know how he was on furlough?

Examiner Wrenn: Just a minute, please.

(Testimony of A. W. Stephenson.)

Would you read me the preceding question and answer?

(The record was read.)

Q. (By Mr. Renda): You don't know how long he was off?

A. He is pretty high on this list. I notice he isn't on your list, so he wasn't off very long.

Q. How about the other pilots that are listed in that letter? Where were they flying at the time of the sale of Route 68?

A. Flying on Route 63, Route 63, and Route 13.

Q. Can you identify their status?

A. No, neither could they.

Q. By that, Captain Stephenson, I mean were they co-pilots? A. Yes.

Q. They knew they were co-pilots?

A. But I thought you were talking about routes.

Q. And is it not a fact that their standing on the seniority list, by comparison, was pretty low, wasn't it? A. The bottom of the list.

Q. And they are the same persons who when we have a cut-back in schedules in September of each year would be the first ones to go?

A. Not the first ones. The bottom of the list would be first. [2133]

Q. Well, they were the first ones to go in 1947, weren't they?

A. Well, there are several of them that are not here any more—or some of them.

Q. Can you tell us specifically which pilots of

(Testimony of A. W. Stephenson.)

those mentioned in this letter of September 4 were adversely affected—or to state that differently, which pilots were furloughed for the sole reason that Route 68 was transferred?

A. Well, had Western Air Lines kept Route 68 and operated normally, none of them would have been furloughed.

Q. You mean to say, Captain Stephenson, that no pilot would have been furloughed in the fall of 1947 by reason of any seasonal schedule cut-backs?

A. No, I didn't say that.

Q. Then where is that statement wrong?

A. Mr. Renda, I would like to know what question you want me to answer.

Examiner Wrenn: Read the previous question.

(The record was read.)

The Witness: I mean had Western continued to conduct a normal operation on Route 68, they would have had to have these 23 men on their active pilot list to conduct their operation.

Q. (By Mr. Renda): Well, now, how do you explain the fact that a substantial number of pilots were furloughed in September, 1948, 13 of which are listed in this very letter? [2134]

A. Because Western's operation has been curtailed since July, 1947.

Q. Did Western sell any routes between September 15, 1947, and September 15, 1948?

A. Between September 15, 1947, and——

Q. September 15, 1948.

(Testimony of A. W. Stephenson.)

A. No, not to my knowledge.

Q. It was a normal operation, was it not?

A. Yes, for Western.

Q. How long have you been flying for Western.
Mr. Stephenson?

A. For Western and National Parks it will be over 21 years.

Q. Isn't it a fact that you know of your own experience each and every year when there is a decrease in the number of schedules operated which is brought about usually by decline in traffic, that pilots are furloughed?

A. I will answer it this way: That we have summer schedules and—to carry the additional traffic in the summer time. And when that is terminated there is a reduction in the number of pilots.

Examiner Wrenn: Well, you seem to both be agreed that that has taken place in 1946 and in 1948. Now, you are disagreeing about 1947. Let's get that one straightened out. That is what I am particularly interested in.

You, as I understand you, say a certain number of them got furloughed because of that, and I understand that Captain Stephenson——

The Witness: If we had kept Route 68 it would have [2135] taken about 30 or 31 men to fly it.

Examiner Wrenn: There wouldn't have been any cut-backs because of taking off schedules?

The Witness: May I explain how that came about?

Examiner Wrenn: Certainly.

(Testimony of A. W. Stephenson.)

The Witness: Between the time that the original hearing was heard before the Board, while the Board had the case under consideration, Western went from four round trips a day to two round trips a day at Denver. That released seven bid captains, or 14 men, to operate the 63 extension to San Francisco-Seattle. And what happened, you see, sir, is that on, I believe it was July 1, my records show that that was done, and there 14 jobs were lost for Western, or we will say were taken from 68 and put on 63. In the meantime, reduction of summer schedules, one schedule came off of Yellowstone on August 31, and on September 15, or some time between August 31 and September 15 not only did the other Yellowstone schedule come off but two round trips to San Francisco came off on 63, and that reflected in this figure here.

Examiner Wrenn: When you say that, you are referring to that letter of September 4?

The Witness: Yes.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Assume that Route 68 had not been sold and schedules were cut back in September, 1947; isn't it a fact that it would have been necessary to furlough the men that we have referred to? [2136]

A. Absolutely not. We would have had to have these three men, and eight more, to fly 68.

Examiner Wrenn: I don't understand your reference to three men there, Captain Stephenson.

The Witness: Twenty-three men, sir.

(Testimony of A. W. Stephenson.)

Examiner Wrenn: Oh, I misunderstood you.

Q. (By Mr. Renda): You are predicating that on your assumption that normal operation is four round trips, aren't you?

A. My assumption that four round trips are the minimum. The minimum that could do it properly.

Q. Mr. Stephenson, do you know anything about the traffic that is moved between Denver and Los Angeles since the sale of Route 68? A. No.

Q. Isn't it a fact that schedules are geared to volume of traffic? Are you familiar with that?

A. I know an attempt is made to do that. But it is not always a true indication of what the traffic is, the number of schedules.

Q. Is it your testimony that the management of Western has been remiss in that respect?

A. No.

Q. I thought you were implying that.

Mr. Bennett: I object and ask that that be stricken—whatever he may have thought.

Examiner Wrenn: The witness' answer is clear on that. Go ahead. The witness has testified that he isn't making any such allegations. What Mr. Renda thinks is his own [2137] thinking.

Mr. Bennett: But it isn't a part of this record, I would think, is it?

Q. (By Mr. Renda): Let us talk about the seniority list. One's number or position on the seniority list never changes, does it? A. Yes.

Q. What brings about that change?

A. If a pilot leaves the company either volun-

(Testimony of A. W. Stephenson.)

tarily or involuntarily every man on the list from the bottom man up to that man's place on the list changes his number.

Q. Isn't that brought about only by several factors: One, resignation of somebody on the seniority list, and as a result everybody moves up automatically——

Examiner Wrenn: Didn't he just testify that?

The Witness: Yes.

Q. (By Mr. Renda): But it is not the sort of thing that fluctuates every month, is it?

A. Seniority lists are only made up twice a year. You only get a number, normally, twice a year.

Q. On the basis of the application of the seniority principle, the contract, these 23 pilots were furloughed, were they not?

Mr. Bennett: May I hear that question?

Examiner Wrenn: Read the question.

(The question was read.)

The Witness: Yes. [2138]

Q. (By Mr. Renda): There was nothing improper about that? A. No.

Q. Now, let us turn to your Exhibit No. 1, page 2. I direct your attention to Richard M. Kennedy. You state he was furloughed in 1946 and furloughed in 1948.

Excuse me. May I withdraw that question?

Examiner Wrenn: All right.

Q. (By Mr. Renda): Do you know, Mr. Stephenson, that Mr. Kennedy was furloughed December 4, 1946? A. Do I know that?

(Testimony of A. W. Stephenson.)

Q. And then recalled on May 22, 1947?

A. That is right. There is apparently an omission—he omitted a three months' period in the summer, of duty.

Q. Now, do you know why he was furloughed in December, 1946, and was off work until May 22, 1947?

A. I don't know that he was furloughed in 1946.

Q. Assume that that is correct—I will withdraw that, Mr. Examiner.

Examiner Wrenn: All right.

Do you want your previous answer to stand?

Mr. Bennett: Well, if he withdrew the question——

Examiner Wrenn: He withdrew the latter one. He withdrew the latter question.

The Witness: What is it?

Examiner Wrenn: Read the previous question and answer, Mr. Reporter?

(The record was read.)

Examiner Wrenn: Do you want that to [2139] stand?

Mr. Renda: Yes, I am going to follow that up.

Q. (By Mr. Renda): Do you know that following his furlough, September 18, 1947, he was recalled May 7, 1948?

A. Yes. That is his statement in the records that we checked.

Q. Do you know he was again furloughed September 15, 1948?

(Testimony of A. W. Stephenson.)

A. Yes, he should have been, from his place on the list.

Q. Why was he furloughed in September, 1948?

A. I never had a statement from the company as to why.

Q. Isn't it a fact, Mr. Stephenson, that you know why he was furloughed, and it was due to the schedule cut-backs September 15, 1948?

A. If you had asked me the question in that manner, I would have answered it for you. Yes.

Q. Why was he furloughed December 4, 1946? Do you know that?

A. I would assume that it was because of cutting back the sixth and seventh schedules to Denver. The seventh schedule and possibly the sixth.

Q. And there was nothing improper about his being furloughed in December, 1946, was there?

A. No, not to my knowledge, no.

Q. Do you know his status at the present time?

A. No, I don't believe he is with us at all any more.

Q. Has he resigned?

A. I wouldn't know that. [2140]

Q. How do you compute the \$3,160 that you claim was the loss he sustained?

A. I only have the month indicated here on which he was furloughed, and when he was called back, the parts of the month. The result would be the number of months he was off duty by his rate of pay.

(Testimony of A. W. Stephenson.)

Q. Will you please identify the months? The months of what years?

A. Well, as your statement shows, he was furloughed in December, 1946. He came back to work in May of 1947—

Q. You are not claiming a loss for that period, are you, Mr. Stephenson?

A. Well, if the man was off he wouldn't get any pay from Western.

Examiner Wrenn: Do you understand Mr. Renda's question?

The Witness: What?

Mr. Renda: Let me see if I can get this straight.

Q. (By Mr. Renda): Do I understand your testimony to be that in the case of Mr. Kennedy he was adversely affected and sustained a loss in pay for the months of December, 1946, to May, 1947? That is part of what goes to make up \$3,160?

A. No. It might have been his computation as to time lost on that. However, the fact—well, I would have to check through all of his months on duty and one thing and another in order to check that figure to make sure.

Examiner Wrenn: Well, you, yourself, don't count it as a proper item for inclusion, do [2141] you?

The Witness: That might not be. All of it might not be. It might be an error.

Examiner Wrenn: Well, my question is, if he has included the time Mr. Renda mentioned from December, 1946, to May, 1947, in reaching that con-

(Testimony of A. W. Stephenson.)

clusion, you would not say that was the proper time to be included, would you?

The Witness: That is right, it would not. But it might be his computation——

Examiner Wrenn: I understand that.

Mr. Bennett: December, 1946?

The Witness: Yes.

Mr. Bennett: Do you mean in this computation?

The Witness: Yes.

Examiner Wrenn: Go ahead, Mr. Renda.

Q. (By Mr. Renda): So in your opinion, the period December, 1946, to May, 1947, should not be included? A. That is right.

Q. Now, how about the period September 18, 1947, to May 7, 1948? Is that a part of this claim?

A. If we were making an itemized claim for dollars and cents in our petition to the Civil Aeronautics Board, yes.

Q. Do I understand, then, Mr. Stephenson, that with respect to Mr. Kennedy his position would be, or is the same as yours, that he is not making a claim for money damages in this proceeding?

A. That is right. We are not asking for money.

Q. All right. Then I invite your attention to Mr. Chapman, and you will note in the second sentence you state [2142] that prior to the sale of Route 68 he was flying as captain.

Isn't it a fact that his status was that of reserve captain?

A. The term "reserve captain" only has one place. It is in the contract. We only have two

(Testimony of A. W. Stephenson.)

classifications of pilots. We have actually captains and co-pilots. A reserve captain is a co-pilot with seniority enough to fly captains' runs, the surplus time, and so forth. True, he is mentioned in the contract, and quite often discussed, but so far as a bid award from the company, and so far as a statement as to what pilots are assigned where, we only talk about pilots and co-pilots.

Q. Isn't it very important in computing the pay, and pay opportunities of a pilot, as to whether he is a reserve captain or a captain?

A. No, not in the least.

Q. Well, now, isn't a reserve captain subject to being bumped when a captain who has full classification isn't able to get his full flying time in a given month?

A. He is. Yes, he would be if you called him anything.

Q. So there is a difference between a captain and a reserve captain as to what his rights may be?

A. No. The reserve captain is a co-pilot who is qualified, and so forth, and it is true the individual is designated as to who is qualified for that time, but that is completely automatic provided he is qualified for the route and the equipment.

Q. Well, let's get it down to cases. Take a captain [2143] that is flying DC-3 equipment on the run between Los Angeles and Salt Lake City, permanent run, flying pursuant to permanent bid, and compare that with the reserve captain who is flying on that same run with the same type of equipment.

(Testimony of A. W. Stephenson.)

Isn't it a fact that the reserve captain is subject to being bumped by a permanent captain, whereas that is not the case with the permanent captain?

A. On Salt Lake City the first reserve captain would have enough flight time—guaranteed enough flight time during the month that he would be sure of his 85 hours.

Examiner Wrenn: Well, let's put it on any other route Western has, and the same set of circumstances. What would be your answer there?

The Witness: May I have the question again, please?

Examiner Wrenn: Well, all I want to know, and what I am trying to find out, is what is the distinction of a permanent captain bidding on a run and a reserve captain?

The Witness: There is that distinction, that a permanent captain can bump a reserve captain.

Q. (By Mr. Renda): So that for pay classification, am I correct that Mr. Chapman, prior to the sale of Route 68, held the status of a reserve captain and not a captain, as we understand it, as was just discussed?

A. That has nothing to do with his statement. He said he was flying——

Q. I don't question that, Mr. Stephenson. It is just important that I establish the truth of this statement. Was he a captain or a reserve [2144] captain?

A. I believe he was a reserve captain.

Q. All right, thank you.

(Testimony of A. W. Stephenson.)

All right, let's turn to No. 10, Mr. J. T. Keller.

About six lines down from the beginning of the paragraph with regard to Mr. Keller, you state that between January and September, 1947, he was required to fly as captain on DC-4 and DC-3 equipment on Route 63 and Route 13 with a resultant loss of pay in the approximate sum of \$1,080.

Well, now, inasmuch as the transfer of Route 63 came about in the middle of September, why do you make any claim for Mr. Keller in any of the months preceding September?

A. Because Mr. Keller was awarded a permanent run on Route 68, in the autumn months of 1946. Under the terms of our contract—he expected that to be a permanent run; the company said it was. Under the terms of the contract he could continue to hold rights to that route for six months after that trip was no longer flown—to return to it. In other words, the 1946 winter schedules were taken off at Denver and never put back on.

Q. Well, now, that was just a normal happening in the business, was it not, the change in schedules?

A. To take them off, but it is usual to put them back on.

Q. I understand that in your opinion once a company has put certain schedules into operation, whether they prove profitable or not they ought to continue so the pilots will have something to fly?

A. Whether they prove profitable?

Q. Yes. [2145]

(Testimony of A. W. Stephenson.)

A. No. They are perfectly justified in not continuing them if they are not profitable.

Q. So that the change in schedules is a normal thing in the business, is it not?

A. It is, that is right. That is what I mean in this case, that the winter reduction and putting them back on in the spring is normal. And from what we understood from our experience that should have held true with Route 68.

Examiner Wrenn: Had the time in which he had a right to go back to Route 68 elapsed before the time this route was approved for transfer, or not?

The Witness: It had elapsed before it was approved, while it was at hearing and being considered by the Board.

Examiner Wrenn: Well, if it had elapsed and he hadn't gotten back on there, how could he be damaged by the transfer? I am interested in getting your thinking on it.

The Witness: In October, 1946, Western Air Lines had six roundtrips to Denver, which they considered a normal operation. They took off six or seven—whatever it was that they reduced, reduced it to four during the winter months. Route 68 is the only route they have that they did not put back to summer operation in the spring, and they never did that. They did it on every other route. Every other route did show an increase in the spring, and that was not done on Route 68.

Examiner Wrenn: Go ahead.

(Testimony of A. W. Stephenson.)

Q. (By Mr. Renda): Mr. Stephenson, in this paragraph you also state that after the sale of Route 68, and in September of 1947, [2146] he was demoted permanently to flying captain on DC-3 equipment on Route 13.

Now, do you know that in response to a bid invitation issued in May, 1947, for permanent run captain vacancies on Route 13, that Mr. Keller submitted a voluntary bid?

A. What was the date of the bid?

Q. May 17, 1947, bid invitation.

A. Yes, I think he did.

Q. Do you know that he was one of the successful bidders?

A. He was.

Q. And he was advised of his new assignment on June 1, 1947, to fly as captain on Route 13?

A. That is right.

Q. Is that inconsistent with your representation here, that after the sale of Route 68 he was demoted and was required to fly elsewhere?

A. On May 7, 1947, he held a permanent run on Route 68. Whether he was flying it or not. And that was flying DC-4 airplanes. And he finally—this bid of May 17, 1947, only held good until October.

Q. Well, now, in May of 1947, at least May 7, surely no one knew whether the Board was going to approve or disapprove of the sale of Route 68. Now, isn't it a fact that this man voluntarily of his own choosing submitted a bid for the right to fly as captain of DC-3 aircraft on Route 13?

(Testimony of A. W. Stephenson.)

A. Sure. If he submitted a bid he was not coerced.

Q. Then if that is the case what difference does it make with respect to this man that Route 68's sale was [2147] approved and the route was transferred?

A. It makes this difference; he did not know what was going to happen to Route 68, but the company had not restored his run on Route 68 and already had petitioned the Board to sell the route. And, furthermore, in line with the thinking of all air line pilots that the pilots go with the route, Mr. Keller no doubt felt he didn't want to go, and if he was assigned 13, flying there, he would in that way indicate that he didn't want to go.

Q. Well, now, you are not indicating that this man has a claim for being adversely affected where he has made a change in his status by reason of his own action prior to the sale of this Route 68?

A. I am. The Route 68 sale was in progress at that time. The contract had been written.

Examiner Wrenn: What you are saying in substance is that he saw something in the offing and he preferred to have a bird in the hand rather than two in the bush—something of that kind.

The Witness: That is right, sir.

Examiner Wrenn: Is the Air Line Pilots union contending that if the condition you seek, namely, that if the pilots on Route 68 were to be transferred with the route, that Captain Keller will be one of those transfers?

The Witness: No, sir.

(Testimony of A. W. Stephenson.)

Q. (By Mr. Renda): Under those circumstances, will you please point out how Mr. Keller was affected by the sale of Route 68 and after his transfer, when the change in his status [2148] occurred prior to the sale?

A. It didn't occur prior to the time the sale was announced. That was May 7th, before the summer schedules were due to be put on.

Q. Well, now, let me get that straight. Is it your position, and the position of these men for whom apparently you are speaking, that they were adversely affected starting from the time the sale was announced, without any regard as to the sale finally being approved by the Board?

A. That is right.

Examiner Wrenn: Is this a good place to stop for a few minutes?

Mr. Renda: Yes, Mr. Examiner.

Examiner Wrenn: All right, we will take a five-minute recess.

(There was a short recess taken.)

Examiner Wrenn: All right, gentlemen, let us proceed. Continue with the cross-examination of the witness, Mr. Renda.

Q. (By Mr. Renda): Mr. Stephenson, I direct your attention to paragraph 11 of Exhibit 1, which deals with Mr. Dick Young.

Mr. Young didn't lose any time, did he, as the result of the sale of Route 68?

A. He continued on the payroll, yes.

(Testimony of A. W. Stephenson.)

Q. Well, he wasn't furloughed, was he?

A. No.

Q. All right.

Now, you will note half way down that paragraph you [2149] state that he was then required to fly as captain on DC-4 and DC-3 equipment on Western's Routes 63 and 13, and so forth. And you further state that after the sale of Route 68 he was demoted to co-pilot flying DC-3 equipment.

Did you know that Mr. Dick Young, in response to Bulletin dated May 7, 1947, publishing 13 permanent run captain vacancies on Route 13, flying DC-3 equipment, submitted his voluntary bid?

A. Yes, I think he did.

Q. Did you know that on June 2 he was advised effective June 1, 1947, he was one of the successful bidders assigned to Route 13?

A. That is right.

Q. And this happened before the approval and the ultimate transfer of Route 68?

A. That is right.

Q. Is there any question with respect to a man submitting a bid on an invitation such as this May 7, 1947, invitation that I have mentioned—it is his own choosing completely, isn't it? He doesn't have to bid.

A. It is his own choosing. It helps him to decide and indicates to him what possibilities he has to fly what equipment over what route.

Q. Now, you turn over to paragraph 13, Robert S. Conover. Did you know that Mr. Conover sub-

(Testimony of A. W. Stephenson.)

mitted a voluntary bid to bulletin dated May 7, 1947, with respect to permanent-run captains on DC-3—DC-4 equipment on Route 13?

A. Before I answer, I would like to have a copy of that bulletin. If you don't have one, I have one and I would [2150] like to get it out. If you are going to run down that list.

Q. That is perfectly all right. I only have this one copy, but you may look at it if you care to.

A. What was the date of that?

Q. Of the bulletin? A. Yes.

Q. The date of the bulletin inviting bids is May 7, 1947. The date of the letter to all pilots announcing the successful bidders is dated June 2, 1947.

A. That is right.

Q. Do I understand you to say that Mr. Conover was one of the pilots who bid for a permanent-run captain's vacancy on Route 13, and was successful? A. That is right.

Q. And that bid was submitted in May of 1947, subsequent to May 7 and before June 2?

A. That is right.

Q. All right. Turn to paragraph 14, where Mr. H. H. Bailey is mentioned. I ask you if the same isn't true of Mr. Bailey, what we have just indicated with respect to Mr. Conover, namely, that Mr. Bailey submitted a bid for permanent-run captain's vacancy on Route 13, and he was successful as of June 1, 1947? A. That is right.

Q. And turn to paragraph 18, Mr. Edward Schuster, wherein you state that after the sale of

(Testimony of A. W. Stephenson.)

Route 68, and in September, 1947, he lost his permanent captain's status and was required to fly as captain on DC-3 equipment on Route 13. That is not correct, is it? [2151]

A. It is correct. He lost his permanent captain's status on DC-4's.

Q. Now, isn't it a fact that he also bid for a permanent-run captain's vacancy on DC-3 equipment on Rule 13 on May 7, 1947? A. That is right.

Q. So that the transfer was of his own choosing, was it not?

A. There was no transfer. He was already off the route. He was not flying 68 at the time he bid. Neither were any of these men mentioned.

Q. All right. When was the last date that Mr. Schuster flew on Route 68?

A. He made trips up until the time it was sold, occasional trips.

Q. At the same time as he held a permanent run as captain on Route 68, he submitted a bid in response to this invitation of May 7, for permanent-route captaincy on Route 13 DC-3 equipment?

A. That is right, but that does not indicate, and I do not intend for this Examiner to understand that that is what he did, fly that route continuously, Route 13.

If I might explain, these men that we have mentioned here were in the status that they had permanent runs, or most of them had permanent runs—perhaps not on Denver, but they flew the reserve time on Denver.

(Testimony of A. W. Stephenson.)

Here is what happens; and was true on Western Air Lines. I don't know how it is on others. Only 85 to 90 per cent of the scheduled time is bid and permanently assigned to [2152] permanent captains on each route. As a matter of fact, United only bids 70 per cent of the permanent time. Then the balance from 10 to 30 is temporary time. So based in Los Angeles, Western Air Lines, when they started operating Route 68, worked on the theory that they wanted as many senior men as possible qualified on DC-4 equipment, and to bid permanent DC-4 runs. And naturally the DC-3 runs they wanted them bid, too. So what would happen with a pilot in the category of being qualified and having seniority enough to fly a DC-4, he would and could, under the contract, and the policy, bid and hold a DC-3 run out of the base, yet he most of the time his flying was as reserve captain in the block above him with DC-4 time, because it was more pay.

Now, what happened, the reason why these men flew trips to Denver was because it was reserve time and Route 63 had DC-4 equipment operating to San Francisco, and DC-4 equipment on 68. Within the contract they had a perfect right to displace, as you mentioned before, a permanent captain had a right to displace a reserve captain on any route on which he is qualified. That is why Mr. Schuster—or why some of these individuals were flying, and entitled to fly under the contract DC-4 schedules to Denver up until the time it was sold.

Q. But that still doesn't change the fact that

(Testimony of A. W. Stephenson.)

these men of their own free will submitted a bid to fly Route 13 permanently in the status of captain, DC-3 equipment.

A. They were not required to fly it permanently, even though they had a bid. [2153]

Q. Well, then, is it a case of one of the evils of seniority rights where a man who is in that position can hold on to some of the more lucrative routes and still at the same time in the event something adverse were to happen be able to jump over on another route? Would you call this kind of a case?

A. I wouldn't call it evils. I would say it is the rights that seniority gives him.

Q. So that if a fellow doesn't have that seniority in order to accomplish this—I mean, it is one of the disadvantages that the seniority creates?

A. Seniority is——

Q. Well, just answer the question “yes” or “no.”

A. Would you repeat the question, please?

Examiner Wrenn: Read the question.

(The question was read.)

The Witness: I deny that it is a disadvantage.

Q. (By Mr. Renda): All right. Now, will you turn to paragraph 15, Mr. Herbert H. Jordan. You indicate that Mr. Jordan was continually in the employ of Western Air Lines as a pilot since on or about July 13, 1946, except during periods of furlough.

Did you know that he was furloughed September, 1946, and recalled May 26, 1947?

(Testimony of A. W. Stephenson.)

A. It doesn't state here. I assume that date is proper.

Q. And did you know that following his furlough September 18, 1947, he was again recalled May 1, 1948?

A. He says June. What do you mean by recalled? The [2154] day he reported or the date he was notified?

Q. The date he went on the payroll, May 1, 1948.

A. That is only information that the payroll department has. I don't have it.

Q. Do you know that he was furloughed September 18, 1948? A. That is right.

Q. Do you know that he was offered reemployment on March 30, 1949, and he failed to accept?

A. I know that he was called to active duty in the United States Air Force on the Air Lift, and exercised his right under the Selective Service Act to take three years' military service, so he had a job.

Mr. Renda: Mr. Examiner, I am not going to move that that be stricken, but obviously it is not responsive to the question. I hope we are not going to get into any flag waving here.

Examiner Wrenn: Read the question for me, Mr. Reporter.

(The question and answer were read.)

Mr. Bennett: I submit it is a responsive answer, because Mr. Renda's question might indicate that the answer is "No," and that is not a proper an-

(Testimony of A. W. Stephenson.)

swer. I will submit that the answer is proper, and I will take out the flag waving.

Examiner Wrenn: Read me the answer.

(The answer was read.)

Q. (By Mr. Renda): So that you don't know that his employment was terminated? [2155]

A. I know the law, and I know that he cannot be.

Examiner Wrenn: When was he called to active service?

The Witness: About the first of the year, sir.

Examiner Wrenn: 1949?

The Witness: Yes.

Examiner Wrenn: All right, proceed.

Q. (By Mr. Renda): Do you know why he was furloughed December 4, 1946, and remained on furlough until May 26, 1947?

A. From December 4, 1946, to May 26, 1947, yes. Reduction in winter schedules.

Q. I presume you would not make any claim for his loss of time for that period, for this man?

A. If there is any understanding that in estimating these amounts of money any of these men are asking for dollars and cents, I wish to make it clearly understood to the Examiner, and all the parties, that this is not compiled or set up in any way to be a claim for money. Because if we were to do that, we would certainly go into the minute details and the accurate accounting. These are nothing but estimated figures to show that a man was off the payroll, that he lost money—so much.

(Testimony of A. W. Stephenson.)

We have never at any time contended this is a figure that we were asking Western to pay somebody.

Q. I appreciate that. But we are building up a record here and it is sometimes important that these things be asked in order that there be no misunderstanding in the record.

Now, you will note that Mr. Jordan was recalled May 1, 1948, and furloughed September 18, [2156] 1948.

A. That is right.

Q. Do you know why he was furloughed September 18, 1948?

A. The statement in Exhibit 1, schedule reductions, is reasonable.

Q. Very well. Now, let us turn to paragraph 17, Mr. Westcott B. Stone. Here again you indicate that Mr. Stone was continually in the employ of Western Air Lines as a pilot since on or about July 1, 1946, except when furloughed. And in this case also do you know that he was furloughed December 4, 1946; recalled May 18, 1947?

A. He states that.

Q. Well, he doesn't state the dates.

A. Well, in trying to reduce this down we didn't go into minute details.

Q. Well, do you question the fact that he was furloughed December, 1946, and recalled in May, 1947?

A. He stated it in this exhibit.

Q. What was the reason for that furlough, if you know? Was it the same as in the case of Mr. Jordan?

A. Yes.

(Testimony of A. W. Stephenson.)

Q. Schedule cut-backs?

A. Schedule cut-backs or flying cut-backs. Incidentally, on this whole group, in your exhibit some of the cut-backs, as explained by you, is Convair training, and completion of that. Now——

Q. I don't want you to testify on my exhibit now. You are not going to sponsor my exhibit, Mr. Stephenson. Just answer my questions, that [2157] is all.

Mr. Bennett: I think he has a right, aside from the exhibit, to explain why he has been asked the question, and——

Mr. Renda: Counsel can take him on redirect at the proper time.

Examiner Wrenn: He doesn't know why he has been asked.

Mr. Bennett: No, but the reason for the cut-back. I think he has a right to answer that question, not from the exhibit, though.

Examiner Wrenn: He can answer that.

Mr. Bennett: If he has anything further to add, I think he can do so.

The Witness: The reasons given for furloughing the first five out of the first six of these men in 1948, was because of the completion of Convair training.

Mr. Renda: Now, let me interrupt, Mr. Examiner. I don't mind this qualifying, but I am not questioning him with respect to that particular thing. I am talking about Mr. Stone. If counsel for A.L.P.A. wants to bring out on redirect, he has the privilege of doing so.

(Testimony of A. W. Stephenson.)

Mr. Bennett: Well, confine your answers to Mr. Stone. If there was any reason why he was furloughed in 1948 that you know of, you should answer.

Q. (By Mr. Renda): The question, Mr. Stephenson, is with respect to Mr. Stone. Do you know that he was recalled May 1, 1948, furloughed again September 21, 1948, and I ask you if you know why he was furloughed in September, 1948? [2158]

A. His statement of schedule curtailment sounds reasonable.

Q. The same as Mr. Jordan, and some of the other boys? A. Yes.

Q. Do you know that Mr. Stone was recalled on March 29, 1949, and is still in the employ of the air line? A. That is correct.

Q. Now, with respect to Mr. George M. Ryan, Mr. Fred W. Wahl, Mr. Floyd L. Aker, who are set forth in paragraphs 19, 20, and 21, none of these gentlemen lost any time, did they, Mr. Stephenson?

A. No. They lost no time. They did lose money.

Q. And that loss in money that you claim was brought about by the shifting of their position on the seniority list.

A. They weren't shifted on the seniority list. Their place on the seniority list shifted with respect to flying so that they couldn't qualify for a permanent DC-4 run.

Q. Just one or two more questions, Mr. Stephenson. The pay computation which you made on the first page of Exhibit No. 1, DC-4 captain, \$1,035,

(Testimony of A. W. Stephenson.)

that is on the basis of how many flying hours? Eighty? A. Eighty.

Q. Eighty flying hours. Although under the contract the maximum contract that you can schedule a pilot is 85 hours, is it your experience that generally one never reaches more than about 80 hours?

A. As a general rule, a group of pilots will average from 79 to 81 hours per month. It depends on the route and [2159] the type of schedules operated.

Q. And that was also true on Route 68, was it not? Pilots averaged around 80 hours?

A. No. In checking over the—I believe the check was made when we were operating only four round-trips, and in the summer months it is possible, if the normal route length—and there are a good many non-stop schedules—it is possible to average 82 or 83 hours. By the same token, if there are a lot of stops on the route, it is difficult to get up to the 80 hours, because the unknown quantity of holding procedures for instrument approaches, and that sort of thing, has to be considered in the beginning of the month when the pilots are scheduled.

Q. Now, assume that Western had not been extended north of San Francisco, that is, from San Francisco to Seattle, and assume that Western had continued to operate Route 68 with the number of schedules it was flying in September and August of 1947. Do you still maintain, Mr. Stephenson, that it would not have been necessary by reason of cut-backs on seasonal schedules at that time to have furloughed either or a substantial number of the 23

(Testimony of A. W. Stephenson.)

pilots as set forth in the letter of September 4, 1947?

Mr. Bennett: Just a minute before that question is answered.

I would like to interpose an objection.

Examiner Wrenn: All right.

Mr. Bennett: My objection is this: The issue in this case is not whether pilots on Western Air Lines were damaged notwithstanding the ordinary expansion of an air line, notwithstanding [2160] that the route to Seattle was extended. I think the issue in this case is whether or not—and I think it is stated clearly in the Board's order—whether or not the Western pilots were damaged by reason of the sale of Route 68. Aside from the fact that this question which has just been posed, which is a hypothetical question and may not contain all the elements that are necessary for it, it is not an issue in this case and I object to it for that reason.

Mr. Reilly: I don't understand the objection.

Mr. Bennett: Who is it speaking?

Mr. Reilly: Mr. Reilly, counsel for United Air Lines.

Examiner Wrenn: Mr. Renda.

Mr. Renda: I think we all know what the issues in this case are. They are set out and are simple. There has been considerable evidence in this proceeding showing what has happened in 1947 and 1948, and we have not been able to develop too much evidence with respect to this particular witness as to just what happened in 1947. All that we are asking

(Testimony of A. W. Stephenson.)

this witness is if the situation in 1946 had maintained status quo back in 1947, what would have happened in 1947. I think the question is entirely proper.

Examiner Wrenn: You and this witness have been arguing back and forth as to whether part of these crews were furloughed as part of the season's cut-back, and I am perfectly willing to have you go ahead and get the witness' answers on that point.

Mr. Renda: I wonder if we can have the question read to the witness and see if he understands it. [2161]

Examiner Wrenn: I don't see what that has to do with it. I don't see what, assuming that nothing had been done, and so forth, has to do with it.

Mr. Renda: Well, because if Route 68 had not been transferred then the question arises as to whether or not there would have been any pilots furloughed at that time by reason of the time that there were seasonal schedule cut-backs. That became effective on the same day, coincidentally, on the same day as the transfer of the route.

Mr. Bennett: Why not ask him that?

Examiner Wrenn: Yes. I have no objection to that.

Mr. Bennett: Neither have I.

Mr. Renda: I have asked him the question a number of times, and I have asked the witness the question which made the assumption that Route 68's sale had not been approved, and no transfer was made, and that no route had been extended

(Testimony of A. W. Stephenson.)

north of San Francisco. So we are talking about the same routes, same mileage, and the same pilots Western had previous to 1947.

Examiner Wrenn: You are asking if the situation in 1946 had continued on whether there would have been a cut-back, or not?

Mr. Renda: Yes.

Examiner Wrenn: Go ahead and answer that.

The Witness: The question assumes that I have said to this Examiner that the cut-back of pilots in August and September was predicated upon the sale of Route 68 and the non-operation of Route 63, which assumption is not correct.

Mr. Renda: Well, Mr. Examiner, this is just the sort of [2162] difficulty I anticipated once I was forced to more or less change my hypothetical question.

I want to put to this witness a hypothetical question, and I think I have a right to do it, and he can answer, or not.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): My hypothetical question asked you to assume, point No. 1: That Route 68 had not been transferred as of September 15, 1947—Western Air Lines instead of United Air Lines was still flying Route 68. Point No. 2: That at the same time Western had not been extended from San Francisco to Seattle, and therefore was only operating on the Coast from San Diego to San Francisco. Point No. 3: That the same seasonal schedule cut-backs were made on September 15, 1947, as were actually made.

(Testimony of A. W. Stephenson.)

Under those circumstances, I asked you, Captain, would any pilot in this group here have been furloughed?

A. If we had been continuing to operate Denver, no.

Examiner Wrenn: That is the answer you made previously isn't it?

Mr. Bennett: Yes.

Examiner Wrenn: I was wondering if his position is the same on that.

Mr. Bennett: Yes, it is.

Examiner Wrenn: All right.

Q. (By Mr. Renda): You recognize that is identically the same situation that existed in 1946 and 1948, and would still result [2163] in furloughing of pilots.

A. No, I do not recognize that as the same situation.

Mr. Renda: No further cross.

Examiner Wrenn: Mr. Reilly, you may cross-examine.

Q. (By Mr. Reilly): Mr. Stephenson, you say you are not interested in monetary rewards which might accrue to you if the Board would attach a condition to this order of approval; isn't that correct?

A. That is right. That is, from either Western or United Air Lines.

Q. What are you interested in, then?

A. Interested in the principle and policy that we in the Air Pilots Association and pilots understand,

(Testimony of A. W. Stephenson.)

we know has always been carried out, that the pilots go with the routes.

Q. Let me ask you a question on that, now. You said in answer to a question, all the air line pilots agree that the pilots should go along with the route. On what do you base that information? You mean that because A.L.P.A. in convention passed a resolution, is that what you mean?

A. No. That is one reason, and another one is because that is what has always occurred.

Q. Did United pilots go along? Did they vote against this resolution?

A. Not against the resolution, original one, no.

Q. Did they vote against the resolution that is before this Board? A. No.

Q. What did they vote against? [2164]

A. They voted for it.

Q. They were in favor of it? A. Yes.

Q. Isn't your interest here, that you would fly Honolulu? A. No.

Q. You are not interested in transferring to United? What benefits would you get by going to United?

A. My first interest in this thing is this——

Q. I asked you what benefits you would get out of it personally, if United were ordered to take you?

A. I would get to fly a DC-6 somewhere.

Q. And then what? What would happen if a vacancy would occur on the Honolulu run?

A. I would have a chance to bid on it.

Q. Where do you stand on the seniority list if

(Testimony of A. W. Stephenson.)

they dovetailed numbers in United and Western?

A. The United boys have informed me there are about 22 on the list.

Q. Pretty good, isn't it? A. Yes.

Q. You would be flying Honolulu, wouldn't you?

A. I haven't said I would.

Q. How many crews did you say it would take to fly one DC-4? A. Where?

Q. Los Angeles-Denver. A. Two men.

Q. What was this seven you were talking [2165] about?

Mr. Bennett: Two?

The Witness: He asked me what it took to fly a DC-4 from Los Angeles to——

Q. (By Mr. Reilly): How many pilots per airplane are assigned on the route? You know what I am asking you.

Mr. Bennett: I object to this sneering way you asked him that question.

Examiner Wrenn: Answer the question.

Q. (By Mr. Reilly): You said they needed seven men per——

Examiner Wrenn: Just a minute, Mr. Reilly. Let him answer the pending question.

Mr. Reilly: I want to be sure he understands my question.

Q. (By Mr. Reilly): How many men would it take Honolulu to San Francisco, bearing in mind the greater distance?

A. I don't know what United's crew scheme is at all on DC-6's.

(Testimony of A. W. Stephenson.)

Q. Suppose they got Los Angeles-Honolulu? You are familiar with that application, aren't you?

A. I have heard they have one. I would like to answer your question——

Q. I would sure like you to.

A. Are you talking about the total complement of men to operate the trip continuously?

Q. Exactly. A. One schedule? [2166]

Q. No—yes, one schedule, that is enough.

A. I couldn't answer that, then.

Q. Let me ask you something about this qualifying time over on Route 63. Is it a fact that you were still flying Route 68 when you were qualifying on Route 63, flying qualifying time on Route 63?

A. Part of it.

Q. And the most time that you could not have been qualified would be approximately five or six days; isn't that right? A. For what?

Q. September 15—when did you go on Route 63?

A. About the 23d of September.

Q. So that the most would be about seven or eight days; is that right? A. That is right.

Q. And under your contract with the A.L.P.A. you were not entitled to qualify with pay?

A. That is right.

Q. Why did you make a claim for qualifying time?

A. Because I had to fly a plane for Western Air Lines for which I wasn't paid.

Q. But that was under your contract. You wanted your contract, didn't you?

(Testimony of A. W. Stephenson.)

A. Yes, but I could have ridden as a passenger over a portion of it, and I was denied the right of making up that time in gainful flying.

Q. What went into this \$175?

A. Twenty-one hours of flying. [2167]

Q. On what days? Between September 23 or September 15 to the 23rd? A. Yes, I think so.

Q. Those five or eight days, whatever they might be? A. Yes.

Q. And United's pilots were flying over Western's routes to qualify at the same time.

A. They had already qualified.

Q. Well, they were still flying on that route for time, weren't they? Weren't they in the jump seat, some of them?

A. Not with us. We weren't flying them.

Q. Up to September 15?

A. Not after September 15.

Q. I said up to September 15. If I didn't, I am sorry.

Now, these seven schedules, when were they operated between Los Angeles and Denver?

A. They were set up to operate in November.

Q. November what? A. 1946.

Q. Were they or were they not operated?

A. I don't know whether the seventh was ever—whether it operated as a trip number on that, or not. I know it was set up and we were designated to fly it.

Q. Were five and six operated? A. Yes.

(Testimony of A. W. Stephenson.)

Q. And you know there were six daily trip schedules? A. Yes. [2168]

Q. Seven days a week? A. Yes.

Q. How was the traffic, do you recall that?

A. In November it wasn't very good.

Q. But they put on the seventh schedule nonetheless, didn't they?

Examiner Wrenn: Is that a question or a statement?

Mr. Reilly: That is a question.

The Witness: What is it?

Q. (By Mr. Reilly): You said the traffic wasn't very good, and I asked you if despite that they put on the seventh schedule.

A. The seventh schedule had been planned several months ago.

Q. And yet they put it on even though they knew traffic was bad?

A. Yes, and they took it off very shortly, too.

Q. But it was operated?

A. As I say, I am not sure how much was done with that schedule. But I know from the pilots' standpoint it was there.

Q. Let me ask you a couple of more questions about you: Have your working conditions been adversely affected by going over to Route 63?

A. Yes.

Q. How?

A. On Route 68 I could fly a non-stop night trip, or a non-stop day trip, which is a much nicer trip to fly than one that makes several stops. [2169]

(Testimony of A. W. Stephenson.)

Q. That is what you consider being adversely affected? A. That is one of the things, yes.

Q. What other.

A. A difference in pay, for one thing.

Q. You would get less pay for the non-stop, wouldn't you, for the hours flown?

A. It is the same pay regardless of whether it is a non-stop, for the hours flown.

Q. It doesn't take as long, does it?

A. Well, you can make more trips.

Q. You can? A. Yes.

Q. Did you? A. Yes.

Q. You made more per day, I guess. Is that the position of you or your association, that the more trips you make the better working conditions you have?

Mr. Bennett: Just a minute. That is not in issue here.

Mr. Reilly: I asked him a question. If you don't want him to answer it, it is all right with me.

Mr. Bennett: I object to the question.

Examiner Wrenn: All right, I will sustain the objection.

Mr. Reilly: Mr. Examiner, as I understand it, if the Air Line Pilots Association has any evidence contrary to the exhibit that has been just discussed about, the rebuttal exhibit of Western, they will produce it, otherwise the exhibit will be considered as accurate. [2170]

Mr. Bennett: You mean you want me to stipulate that it goes into the record as being perfect?

(Testimony of A. W. Stephenson.)

Mr. Reilly: Unless contrary evidence is presented before that time, yes.

Mr. Bennett: If Mr. Renda presents his exhibit, and I do not see fit to object to that at that time, and Mr. Renda's exhibit is received into the record, that will be all right with me.

Mr. Reilly: That is all right with me, too.

Mr. Kennedy: It will be subject to whatever defects are shown on cross-examination.

Mr. Reilly: All right.

Mr. Bennett: Then what does your statement mean?

Mr. Reilly: Well, let the record speak for that. We don't need to argue about that.

Examiner Wrenn: Have you any further questions, Mr. Reilly?

Mr. Reilly: Yes.

Q. (By Mr. Reilly): Can you tell me why the resolution was adopted after a hearing in this case?

A. A resolution like that can only be adopted by the A.L.P.A. board, or executive meeting.

Q. And that was the first one held after the filing of the application? A. Yes.

Q. The application was made May 22 and the meeting was held May 24, 1947. A. Yes.

Mr. Bennett: I think the hearing was held May 20.

Mr. Reilly: The hearing was concluded May 22, the C.A.B. hearing. The other I am talking about is May 24, the A.L.P.A. convention in Chicago—what do you call it, executive board or convention?

(Testimony of A. W. Stephenson.)

The Witness: Executive board, that meeting was.

Q. (By Mr. Reilly): Does that resolution, as adopted by the executive board, mean that in the event that the C.A.B. will not condition that all pilots will go, that there will be no transaction with the route; there can be no compromise?

Mr. Bennett: I think the resolution will speak for itself.

Mr. Reilly: I think the Board is very much interested in what they can do in this proceeding, if there comes a time when maybe one pilot or two pilots have been hurt.

Examiner Wrenn: The question is proper. Now, the only question in my mind is whether this is the correct witness.

Mr. Bennett: I withdraw my objection, and I might state for the edification of Mr. Reilly, and the Examiner, that at the end of this hearing we will clarify both the Western and United pilots' position regarding the fact that is now before us. But I withdraw my objection.

Mr. Reilly: That isn't the purpose of my question.

Examiner Wrenn: Go ahead and answer the question.

Q. (By Mr. Reilly): What I want to know is whether or not the adoption of this resolution precludes the disposition of this case any other way, in the event the Board finds that certain pilots [2172] have been adversely affected by this transaction?

(Testimony of A. W. Stephenson.)

Mr. Bennett: Do you understand the question?

The Witness: I would say that the resolution, we don't expect that the resolution has any binding effect on the companies. It is a statement of A.L.P.A. policy to be a guide for us and a statement of our position to the Civil Aeronautics Board, or any other authority.

Examiner Wrenn: Yes, but I don't think that is quite the answer to what Mr. Reilly asked you, Captain.

Read the question.

(The question was read.)

The Witness: The answer is "Yes."

Q. (By Mr. Reilly): Would you accept the Burlington formula?

A. I can't speak for the Air Pilots Association, or its groups.

Q. You are its witness here today.

A. Well, I would say no, if I were——

Q. As I understand your testimony, Captain, Exhibit 1, of which the last page has the estimated financial or monetary loss to certain-named captains or co-pilots, is being presented only to show that there has been a monetary financial loss to those described people.

A. That is right.

Q. It is not being presented, as I understand it, as a claim against Western or United?

A. That is right.

Q. And it is not being presented in the hope that the Board might award or suggest, or direct, or order Western or [2173] United to recompense the

(Testimony of A. W. Stephenson.)

named persons for the amounts estimated set opposite their names? A. That is right.

Mr. Reilly: That is all.

Examiner Wrenn: Mr. Kennedy, you may examine the witness.

Q. (By Mr. Kennedy): Mr. Stephenson, as I understand it, this resolution about which Mr. Reilly has been questioning you was adopted by the Air Line Pilots Executive Board on May 27, 1947? A. That is correct.

Q. Was that ever considered in an Air Line Pilots Association convention subsequent to the meeting of the executive board?

A. I have no direct knowledge of what convention considered it, but I am sure that it has been considered in a recent convention.

Q. It has come up in a recent convention—were you present at such convention? A. No.

Q. Were you a member of the executive board of the Air Line Pilots Association at the time this resolution was adopted? A. No.

Q. Are you prepared to tell us just how the executive board of the Air Line Pilots Association is set up?

A. It is set up in this manner: A pilot and co-pilot representative from every air line is represented on that [2174] board—every air line that is affiliated whose pilots are members of the Association.

Q. So the Western Air Lines' council had a pilot and co-pilot represented, and United Air Lines, and American Overseas, and Inland, and

(Testimony of A. W. Stephenson.)

so on? A. Yes.

Q. Do you know how United's representatives voted at this meeting?

A. My information is, from both the United chairman and my own chaster chairman at that time, that they voted for it.

Q. Do you know what position the United Air Lines pilots may have taken at any subsequent convention of A.L.P.A.? A. No.

Q. You don't know whether or not at any subsequent convention they opposed the policy embodied in this resolution? A. No.

Q. Mr. Stephenson, which Western pilots do you think United should take over? I mean, which category?

Mr. Bennett: May I interrupt for a moment?

Examiner Wrenn: Mr. Bennett.

Mr. Bennett: At the end of this hearing, or the presentation of the Air Line Pilots case, I will make a statement for the record which will completely clarify that particular subject.

Examiner Wrenn: You aren't sworn.

Mr. Bennett: But I will be making a statement on behalf [2175] of both Western and United pilots, which will indicate that they are in complete agreement on the subject.

Examiner Wrenn: Well, that is not the question Mr. Kennedy has asked.

Mr. Bennett: He wants to know who should go, and how many.

Mr. Reilly: We will object to that unless it is by someone under oath.

(Testimony of A. W. Stephenson.)

Mr. Kennedy: Could Mr. Bennett make the statement now so that I could examine on it?

You don't have any policy witness?

Mr. Bennett: Our policy is indicated there in our pleadings.

Examiner Wrenn: Your question is perfectly proper, Mr. Kennedy. Go ahead and address it to the witness.

Q. (By Mr. Kennedy): Which category of Western pilots should United take over?

A. Pilots who were flying that route, or pilots junior to them.

Q. You don't have any definite notion as to which it should be?

A. Isn't that clear, that the policy is the pilots who were flying that route, or pilots junior to them?

Q. Would the Route 68 pilots have the first bid, and the first opportunity to go with United?

A. That is right.

Q. They have the first opportunity?

A. Yes. [2176]

Q. So that you and the men who were flying Route 68 with you would be the first to have a choice of going to United?

A. According to seniority.

Q. And choice would be theirs rather than that of either company?

A. That is right.

Q. Now, if, let us say, two pilots who had been flying Route 68 decided not to go, then you would get to the next number on the seniority list and give those fellows a choice?

(Testimony of A. W. Stephenson.)

A. That is right.

Q. Let's suppose that you and the people on Route 68 were all to go into United; wouldn't that necessitate bumping some people on the United's list?

A. I assume that it would. However, I can explain our situation on this. Considerable time has elapsed since this took place, and there are men that would come in that category we contend should have gone with United that are not even with Western any more, that are in the service, and so forth. And the second executive board meeting recognized that problem, and recognized it was a determination that would take a considerable period of time, and set the procedure for us to follow in establishing our standards.

Q. I don't *want* follow you on that. Do you mean to suggest that if, let's say, Pilot Jones had been flying Route 68, and he was one of the pilots who was flying Route 68, and Pilot Jones is now in the Army, that United would be required to take over only 30 pilots; is that right? [2177]

A. That might be, if there was no one else who wanted to go.

Q. Then you are saying that if there were 31 pilots on Route 68 United would be required to take 31 pilots?

A. No, we have no indication in that direction to arbitrarily fix a number two and a half years

(Testimony of A. W. Stephenson.)

after; that is, insofar as Western pilots were concerned.

Q. How would the Board write an order, Mr. Stephenson? What would they direct United to do?

A. We would ask them to direct United Air Lines to take what was the agreed-upon number and agreed-upon pilots between United pilots and Western pilots.

Q. What basis would you have for agreeing on the number? Would that be a matter of negotiation between the pilots?

A. That would be a matter of completing our meetings we have with them, the completion of the arbitration we already have in progress with them.

Q. Do you have an arbitration pending with them now—with United now?

A. With United pilots. We have a procedure in progress under our A.L.P.A.

Q. Oh, I see. United pilots and Western pilots are trying to agree on the number of pilots?

A. We are bound to.

Q. Then when you have arrived at that agreement as to that number, then it would be the agreement of the Air Line Pilots Association that United would take that number of pilots into their organization? [2178]

A. We would recommend to the Examiner and this Board that that is our proposal for the solution, and we would hope that they would do it.

Q. Let's pull a figure out of the air and assume

(Testimony of A. W. Stephenson.)

25 pilots, that that would be the number you and United pilots would agree on. Wouldn't that necessitate bumping the equivalent number of pilots on the bottom of the United's list?

A. Well, I might say that is an impossible number at this time.

Q. Let's say it is five.

A. Now, let's repeat the question again.

Examiner Wrenn: We are only interested in the principle, whether it is five or twenty-five doesn't matter. We are interested in the principle.

Q. (By Mr. Kennedy): Wouldn't United be required to drop from the bottom of its list—furlough—the number of pilots equivalent to the number of pilots they take over from Western?

A. Yes, I suppose so.

Q. Do you think, and Air Line Pilots Association think, that any provision should be made for those pilots?

A. I think it is up to the two groups to make a recommendation on that coordinated with the Air Line Pilots Association headquarters.

Q. Is Air Line Pilots Association prepared to make a recommendation on that in this proceeding?

A. No, I don't think so.

Q. Why, Mr. Stephenson, should the people who are on the bottom of United's seniority list take the loss on this [2179] rather than, say, Mr. Horn and Hoagland down a ways on the Western seniority list?

(Testimony of A. W. Stephenson.)

A. Because of the contract, the employment agreement that the pilots have with the company that provides for reductions, curtailment, or anything of that kind.

Q. You mean that is a loss that the United pilots incur because of the contract between United pilots and United? A. That is right.

Q. I don't understand that. What is there in that contract which subjects them to a possible loss because United takes on an additional operation?

A. Because of the policy that the pilots go with the routes and retain their seniority.

Q. You think from the point of view of United, or the United pilots, that is more or less of a calamity they have to face just as they would have to face a cut-back in United's schedules for some operating reason?

A. That is right. They put some 30 men to work on that route, and they had 30 jobs that we lost.

Q. Why wouldn't you look at it, from the point of view of the Western pilots, why isn't the sale of a route by an air line a natural calamity just as a reduction of schedules?

A. Because it is not our thinking and our policy. The pilots go with the route, and the pilot retains his rights. Companies and routes change, but men never do.

Q. Well, let's suppose that is the policy—as we are all clear it is. What is the justification for it?

(Testimony of A. W. Stephenson.)

A. Because it has been long established. [2180]
It has happened ever since we had such things. It has always been done that way. It is similar to other organizations, particularly in the railway groups, and things of that kind.

Q. Did you make any study of the railway situations that are comparable to this to determine whether they do it the same way in the railway business?

A. I did not. However, I am——

Examiner Wrenn: Had you completed your answer?

The Witness: Yes.

Mr. Kennedy: Yes, I understand he had completed his answer.

Q. (By Mr. Kennedy): Do you know what the Burlington formula provides, Mr. Stephenson?

A. In a general way, yes.

Q. Could you tell us why you think that is not a desirable formula?

Mr. Bennett: I don't think this is proper cross-examination. We have another witness on that subject who will be available. There was nothing on direct examination of this witness in that regard.

Examiner Wrenn: Technically, you may be correct, but we do exercise considerable latitude in these things, as I remarked in your favor today when you wanted some information. We want some information here, and this seems to be the most appropriate way to get it, so far as A.L.P.A. is concerned. Mr. Kennedy could certainly call Captain

(Testimony of A. W. Stephenson.)

Stephenson as his witness if he wanted to, and it seems we are just standing on technicalities here if he has to say: "Mr. Stephenson, [2181] you are now my witness."

Mr. Kennedy: I will be happy to call him as my witness.

Q. (By Mr. Kennedy): When Mr. Reilly asked you if the Burlington formula would be acceptable, you said "No," and I am wondering why?

A. Because technically with regard to a younger pilot, what he is interested in is security in his profession. I am a charter member of the Air Line Pilots Association, and I have been flying on routes ever since the first mergers occurred. I have seen mergers, sales, transfers, and always the pilots have gone with the routes, that principle has been maintained.

When you discuss with any of our membership anywhere, I have never found anyone in discord with that theory.

For instance, if we applied the Burlington formula to this thing, we would come down to one of these pilots who was moved from captain to co-pilot, and if we applied the Burlington formula, as I understand it, we would say, "You will have to stay with Western, and you will have to fly as co-pilot, but they will pay you your captain's pay."

Well, that is something to think about. But, after all, that gives him no insurance for his future. He lost his opportunity to stay and develop with

(Testimony of A. W. Stephenson.)

the—or stay on the captain's side and develop himself as a pilot.

If we had said to these 23 men on the bottom of the list, "We will pay you according to the Burlington formula, and you are done," in the first place we couldn't do it under our existing contracts, I don't think. We provide that when [2182] they are furloughed they have a certain length of time to remain—if they are never coming back—they are still the bottom man on the list the day there is a chance to fly.

Q. Mr. Stephenson, isn't the sense of your testimony that you don't think the Burlington formula is as good as the proposal you are making?

A. That is right. And I don't think it answers the pilots' requests in any way.

Q. Well, now, if the Board were to decide that the Burlington formula were appropriate, you wouldn't reject that, would you? A. Yes.

Q. What would be your course of action then?

A. I don't know.

Q. Well, would you consider it appropriate to call a strike on Western on that issue?

Mr. Bennett: I object. I don't think he has even the authority to call a strike on Western.

The Witness: I certainly do not.

Q. (By Mr. Kennedy): Would you consider it appropriate to propose to the proper authorities that they call a strike on Western?

A. Not until every resource of clarifying our problem, and our stand, had been made, and the

(Testimony of A. W. Stephenson.)

last resource had been exhausted. Then I don't know. I have no authority and I don't know what we would do.

Q. How about a strike on United? What would be your thought on that subject?

Mr. Reilly: I thought you would get to [2183] that.

Mr. Bennett: I don't think that is appropriate in cross-examination.

Examiner Wrenn: I think you have gone far enough on that, Mr. Kennedy.

Mr. Kennedy: All right. That is all I have.

Examiner Wrenn: Does Council 57, United Air Line Pilots, have any questions of this witness?

Mr. McBain: No, sir.

Q. (By Mr. Reilly): Mr. Stephenson, you said you have been familiar since you have been flying with all the mergers, acquisitions, and so forth. Have you ever heard of one where only a route was involved?

A. That was not being operated?

Q. No. Where only a route was being sold, a segment of a system, as Route 68 of Western.

A. Where there were no personnel.

Q. No, where the whole company wasn't being sold. Just a route.

A. I am not familiar enough with all of the mergers in the East here; that is, closely familiar with them, to know just what was involved.

Q. You, yourself, can you answer that "yes" or "no"? If you can't, then the record will show.

(Testimony of A. W. Stephenson.)

A. Where only a route was involved?

Q. Yes, that is right.

A. Yes. National Parks Airways was a route.

Q. When was that? A. 1937. [2184]

Q. That was part of the Civil Aeronautics Act; that was the whole company, wasn't it?

A. That is right. But it was just a route.

Q. It was the whole company, though, wasn't it?

A. Yes.

Q. You went with it, too; you went with Western Air Express as a result of that, didn't you?

A. That is right.

Q. Do you know of any case in which the Board by a merger, consolidation, or sale of a route, a case where they have directed them to do anything, to follow this prescribed formula the Air Line Pilots' Association has suggested in this proceeding? A. Not directed, no.

Q. Let me ask you another question. You said this is policy. What is the policy of the Air Line Pilots' Association with respect to the T.W.A.-Bonanza transaction which is now pending?

A. The policy——

Q. Are the T.W.A. pilots going to Bonanza?

A. I don't know the answer to that one.

Q. Well, let me ask you another one. You are familiar with the opportunities which Western offered to Arizona Airways to operate Phoenix-Yuma? A. Yes.

Q. Have the Western pilots of the A.L.P.A. taken the position that the Western pilots were

(Testimony of A. W. Stephenson.)

going to operate Yuma-Phoenix for Arizona Airways?

Mr. Bennett: If you know. [2185]

The Witness: I don't know.

Q. (By Mr. Reilly): You would know as master of your Council, wouldn't you?

Mr. Bennett: That assumes that he is master of his Council.

Mr. Reilly: It is in the record.

Mr. Bennett: It isn't for this year.

Q. (By Mr. Reilly): What are you now?

A. I am representing Western Air Lines' pilots in this case.

Q. You were master of your Council when that case was up? A. Yes.

Q. Was there ever any discussion at that time about that case? A. Yes.

Q. Did you come to a conclusion whether or not the pilots of Western were to operate the Yuma-Phoenix route for Arizona Airways?

A. No, we did not. We decided we had an interest in that, and there might be one or two pilots involved in case Yuma—that segment—was transferred to Arizona.

Q. What would happen if there were one or two?

A. There is very little flying involved. It is less than one hour a day.

Q. If there were only one or two pilots involved in this case, are you interested? [2186]

A. No.

(Testimony of A. W. Stephenson.)

Mr. Reilly: That is all I have.

Mr. Renda: I have just one or two questions, Mr. Examiner.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Captain Stephenson, if the Board were to attach the condition which you have requested, that the pilots be transferred to United, is it your recommendation and your opinion that it should be those pilots who were flying Route 68 as of the date of transfer?

A. Or pilots junior to them, as of the date the sale was announced.

Q. How about the co-pilots?

A. We are talking about pilots. When we say "pilots," we mean both.

Q. How about the co-pilots, would they go, too?

A. Yes.

Q. Now, wouldn't the seniority principle preclude that? Supposing a captain who had not been flying on Route 68 wanted to be transferred with the route, would he be preferred over a co-pilot who had been flying Route 68?

A. No. Why should he?

Q. Well, I am asking you.

Mr. Bennett: You have answered the question.

Examiner Wrenn: Go ahead.

The Witness: We think our theory is straight. The pilots flying the routes go with the routes. That is what we want. [2187]

Examiner Wrenn: When you say "pilots," do you include the co-pilots?

(Testimony of A. W. Stephenson.)

The Witness: Yes, always. When we say "pilots," we say any man, either a pilot or co-pilot.

Q. (By Mr. Renda): So in your opinion if the Board were to accept the September 1 date, for example, and you were flying Route 68 at that time, and you have position No. 3 on the seniority list, and Mr. Shirk was also flying Route 68 as a co-pilot, and had position No. 137 on the combined Western-Inland seniority list, Mr. Shirk should be transferred, also? A. That is right.

Q. And someone who would be occupying position seven, eight, or nine on the seniority list, but had not been on Route 68, would not be able to bump Mr. Shirk in this connection?

A. That is right.

Q. How many of the people who have flown on Route 68 in Western Air Lines have expressed a desire to you that they wanted to transfer to United—besides yourself?

Mr. Bennett: Do you want to fix a date?

Mr. Renda: I don't want to fix a date. I want to know at this time——

Mr. Bennett: At this time.

Q. (By Mr. Renda): How many want to go over to United? A. I don't know.

Q. Have you discussed this with them?

A. Yes. Not recently. [2188]

Q. Well, when was the last time you discussed it?

A. Well, discussed that point, they haven't indicated to me because I told them that I wasn't

(Testimony of A. W. Stephenson.)

ready for that information yet, to even consider it. The thing had to be established and set up as a plan so a man could make an intelligent decision on what he wanted to do.

Q. Given the opportunity, you would be willing to transfer?

A. I would be willing to transfer if by my not doing so one of these junior men was put out of a job. I mean, if I passed up my opportunity and by so doing it put a junior man who was flying the route at that time out of the job, I would do it.

Q. Mr. Stephenson, I appreciate your solicitude for the junior man, but I want to know irrespective of that if the Board attached a condition, and you were given the opportunity, would you yourself want to transfer to United?

A. That is my answer.

Q. Your answer is "Yes"?

A. My answer is my previous answer.

Q. Do you know if Mr. Fred Kelly, No. 2, would want to transfer? A. No.

Q. Do you know if Mr. Carlton would want to transfer? A. No.

Q. Do you know if any of them would want to transfer?

A. Yes, I have a pretty good idea some of them would.

Q. Please give the names.

Mr. Bennett: Well, now, just a minute. We don't want [2189] the names if he just has an idea. We don't want just an idea.

(Testimony of A. W. Stephenson.)

Examiner Wrenn: If he knows.

Mr. Kennedy: I don't think we need the names. It does not help the question.

Mr. Renda: It is not going to hurt.

Mr. Kennedy: We have the testimony.

Examiner Wrenn: I haven't heard anybody object to giving the names.

Mr. Bennett: Well——

Examiner Wrenn: I am interested in the numbers.

Mr. Bennett: I recognize that, and before this hearing terminates we will assure you that the number will be recommended not only by Air Line Pilots Association——

Examiner Wrenn: Let's find out what this witness knows as to the number of people who have told him they want to go. If he doesn't know, he can say so.

The Witness: I don't feel that I can state definitely of my own knowledge at this time whether they are one or more, one or twenty, or what the number might be, or what their inclination might be.

Q. (By Mr. Renda): Have you ever discussed it with Captain Turner, as to whether he wants a transfer to United?

A. No, because I knew it wasn't necessary.

Q. Does he want a transfer to United?

A. No, I know he doesn't.

Mr. Renda: Mr. Examiner, that is why I want to know the names, because we have gone through

(Testimony of A. W. Stephenson.)

several agreement procedures [2190] in our company and there has always been this representation on the part of the Air Line Pilots Association voiced by Mr. Stephenson that this is the wish of the air line pilots, and when we get down to cases we don't find that.

If Mr. Stephenson does not know, he can say so. He has discussed this with certain pilots, and if he knows there are certain pilots who want to be transferred, it is proper for him to tell us how many there are, and who they are.

Mr. Bennett: I submit he has answered the question. He says he doesn't know who they are, or how many there are. I don't think anybody could testify on that subject. The only way to get an answer to that would be to bring the pilots in and ask them.

Q. (By Mr. Renda): Well, then, let me ask you this: You are sponsoring Exhibit 1 here, and you have discussed this case with a lot of people who have worked for our company, and you have a lot of facts in here, and I suppose in that discussion you have also discussed this proposition of pilots wanting to transfer.

Do you know of your own knowledge whether any of the pilots allegedly adversely affected desire to transfer to United, other than yourself?

A. Yes. I am confident that there are some that will.

Examiner Wrenn: Do you know?

(Testimony of A. W. Stephenson.)

The Witness: I have no commitment from anyone that he would go.

Examiner Wrenn: Did you question these 21 in here? Do [2191] you know of your own knowledge about their own feelings in the matter?

The Witness: Mr. Examiner, I have discussed it many, many times with many groups and many different individuals, and because I don't have an up-to-date group, or an up-to-date list of who might be interested, I am remiss in that respect, but it has never occurred to me that it was proper, as yet, to ask a man whether he wanted to go with United on this transfer when it was made, because I couldn't answer to him how many was going, or when they were going, or under what conditions.

Examiner Wrenn: In other words, you do not have a clear, definite idea on that situation?

The Witness: No, sir. We have a plan to get it in our arbitration; we have a method between our two groups, of getting at that information, getting it soon.

Examiner Wrenn: But you don't have it now.

The Witness: No, sir.

Q. (By Mr. Renda): Captain, then how did you come to some agreement as to the pilots' position in this case, that the pilots who had been flying on Route 68 wanted to be transferred to United?

Mr. Bennett: Will you designate the party? I am not sure what you mean. Do you mean——

(Testimony of A. W. Stephenson.)

Mr. Renda: The pilots that are involved here, yes.

The Witness: I don't understand——

Q. (By Mr. Renda): You have testified that it is your position, and it is the position of the pilots who are flying Route 68, [2192] that the Board ought to find that they are adversely affected and as a result should attach a condition that they should be transferred to United. Let's not go into how it could be done, or should be done. Let's stop there.

I want to know how you arrived at that conclusion. Is it just your opinion? Is it the combined opinion of the men who were flying? If it is, then I think that is the foundation for your telling us how many want to be transferred.

Mr. Bennett: I think the question has been answered by a resolution of the entire Air Line Pilots Association, including all of Western's pilots and all of United's pilots. I submit the question that has been just put has been answered. But, however, if you insist on it, go ahead and answer it.

Mr. Renda: Mr. Examiner, at times I find it difficult to distinguish between the Air Line Pilots Association and Mr. Stephenson. I think he gets my point.

Examiner Wrenn: Go ahead and answer.

The Witness: I believe I understand the question. Some time between March 7, 1947, and March 19, 1947, the newspaper announcements were made

(Testimony of A. W. Stephenson.)

that Western Air Lines was selling Route 68 to United Air Lines.

During, I think it was about the 10th or 12th of March, 1947, a pilots' meeting was called of Council 16 of Western Air Lines, in Salt Lake City at Hollywood Roosevelt Hotel, and company officials were asked to be present. And Mr. Wooster, Chief Pilot, and Mr. Thayer, Assistant Chief Pilot, represented the company. It was a meeting at which there were some who—everybody in town was either there or [2193] represented. This news was discussed, and some individuals were naturally very much concerned about it as to what was going to happen—whether the pilots were going to go with the route, or what was to happen.

The majority at the meeting decided to ask Mr. Wooster to call Mr. Drinkwater on the telephone here in Washington, and advise him we were much concerned and wanted the policy of the years past, which is known to every Air Line Pilots Association member—that the pilots go with the route—

Mr. Renda: Mr. Examiner, I don't want to interrupt the witness, but I think he is getting pretty far afield, and I don't think the answer is responsive to the question.

Examiner Wrenn: I can't tell yet.

The Witness: I mean that the answers started from that meeting, and previous meetings, as to what had been done to approve what had been done, is my reason for stating the pilots' position, or my justification for stating it.

(Testimony of A. W. Stephenson.)

Q. (By Mr. Renda): Then let me ask you this: Did the Western's Council pass any resolution with respect to this? A. Yes.

Q. What was the nature of that resolution?

A. To instruct Air Line Pilots Association headquarters that they insist that the policy be carried in this case.

Q. When was that passed?

A. That is what we passed that day.

Q. That is——

A. That is the action that was taken, and the report [2194] of it was verbally by telephone transmitted to Mr. Drinkwater in Washington.

Q. You were Master Councilman at that time?

A. No, I was not, but I was there.

Q. Well, then, Captain, you cannot give us at this time any number of the particular pilots that you feel should be transferred in the event the Board were to find that such a condition was appropriate? A. That is right. I can't.

Mr. Renda: No further questions.

Examiner Wrenn: Mr. Reilly.

Q. (By Mr. Reilly): Is your feeling about the pilots going with the route, because you feel that the pilots have a proprietary interest in the route?

A. I am not——

Q. Well, property right. Do you think they have a property right in the route?

A. I think they have a right to fly the route. I don't think they have a right to claim that the

(Testimony of A. W. Stephenson.)

route is part theirs, or that they have any monetary interest in it.

Q. How far do you think their interest goes?

A. The right to fly it.

Q. Then why are you worried about pilots who were not flying the route being taken over by the United Air Lines?

Mr. Bennett: I submit that is argumentative.

Mr. Reilly: It is not argumentative.

Mr. Bennett: It is argumentative.

Mr. Reilly: Well, the Examiner can decide it. [2195]

Examiner Wrenn: Answer the question, Captain.

Q. (By Mr. Reilly): I say, if you say their interest is the right in flying the route, why is it you are insisting here that those pilots not flying the route should be absorbed by United?

A. I am not insisting on it.

Q. Well, in the event that the pilots who were flying the route do not want to go, you would give them the opportunity of going; is that correct?

A. I don't understand you.

Q. If you, for example, decide not to go with the route, that you don't want to go with the United—and I know that you don't—if you decide that you don't want to go, then what happens?

A. Another man who was flying the route has the opportunity.

Q. And then if he doesn't want to go, doesn't

(Testimony of A. W. Stephenson.)

it go down the line until you get to somebody on Route 13? A. Very unlikely.

Q. Then, all you are interested in is those pilots flying the route.

A. The date that the sale was announced.

Q. That is all you are interested in?

A. That is right.

Q. Nobody else? A. That is right.

Mr. Reilly: O. K.

Examiner Wrenn: Captain Stephenson, if the Board should order the transfer of pilots of Western's Route 68 to [2196] United, does that settle the matter, or do we get into another controversy over seniority lists?

The Witness: No, sir. Between the pilot groups we have agreed on a procedure to indicate to you how we would do that, and it would be, after all, the seniority list of an air line is something between the management and the pilots, and if United pilots and ours agree on that, on the number, we will say, and the people, the——

Mr. Bennett: Identity.

The Witness: The identity, we feel we have done our part, and it is within the contracts we have, and everything else, and it should be considered as the decision of both groups, and should stand with both companies.

Examiner Wrenn: You think it is both possible and their duty to do that?

The Witness: For the pilots to reach that agreement.

(Testimony of A. W. Stephenson.)

Examiner Wrenn: Yes.

The Witness: I am sure of that.

Examiner Wrenn: And there is no question as far as the pilots are concerned as to that the seniority problem could be settled satisfactorily?

The Witness: We agree to that.

Examiner Wrenn: Well, I don't want to argue other cases with you.

What is the No. 1 route as far as Western pilots are concerned; that is, those with the most seniority?

The Witness: Now?

Examiner Wrenn: Yes.

The Witness: Route 63. [2197]

Examiner Wrenn: That is the whole route north from Los Angeles to Seattle, or just the extension from San Francisco?

The Witness: Los Angeles to Seattle. We have to fly it that way, sir.

Examiner Wrenn: Is your rate of pay on that comparable to the rate of pay on Route 68?

The Witness: Yes.

Examiner Wrenn: With the exception, possibly, of some terrain features, or——

The Witness: No. We have terrain on neither one. Never did have terrain on those routes.

Examiner Wrenn: Well, do I correctly get the impression from your testimony that given your choice you, yourself, personally—given your choice as the No. 3 man on the Western seniority list, if

(Testimony of A. W. Stephenson.)

you were going out to bid a route you would bid the 68?

The Witness: If we had it.

Examiner Wrenn: If you had it, you would bid the Route 68 in preference to 63?

The Witness: That is right.

Examiner Wrenn: I don't want to get into any hypothetical field there, but I was just wondering if you had kept Route 68 and got 63, whether there would be any inclination on the part of the pilots to bid 63 as a better run.

The Witness: No. Because on Route 68, just as United does now, we could operate a number of non-stop schedules. You know that weather—also passengers and other delays—is not going to affect you once you are off the ground on—or at least you can expect, after you are off the ground [2198] at any terminal until you arrive at the other terminal. Consequently, you get four hours or four hours and 40 minutes of flying the easiest way it is possible to get it.

Examiner Wrenn: Your answer is dictated by an operation of, we will say, DC-4 equipment, not the fact that if you kept Route 68 there might have been the possibility of putting DC-6's on?

The Witness: That is on DC-4 or DC-6 equipment, either one. It would apply.

Examiner Wrenn: Are you going to have much redirect?

Mr. Bennett: Mine is going to be rather exten-

(Testimony of A. W. Stephenson.)

sive. I would suggest that we go over until tomorrow morning.

Mr. Kennedy: I have one question which can wait until the morning, however.

Examiner Wrenn: Go ahead.

Q. (By Mr. Kennedy): It seems to me an answer you gave Mr. Reilly contradicted an answer you gave me. I understood that you said if the pilots flying 68 didn't want to go to United, then the pilots junior to them would have the opportunity to bid to go to United.

A. As I understood Mr. Reilly, he was trying to get an indication of a number, or we were talking about that we would go and get the entire group and move it over. The thing is this: I believe at this stage that we, everyone's ideas on the thing, in meeting with the pilot groups, that we can comply with the A.L.P.A. policy in the numbers and identities and never vary from men who are qualified on 68, and flying it. [2199]

Q. Is it your testimony that you think that is the way it would work out? A. That is right.

Q. Now, it is possible that it wouldn't work out that way, that some of the Route 68 pilots would say "We don't want to go with United," and then it would be your policy to take some of the junior ones? A. That is A.L.P.A. policy.

Q. So your answer to me was directed to policy, and your answer to Mr. Reilly was directed to the way it was going to work out.

(Testimony of A. W. Stephenson.)

A. That is right.

Mr. Kennedy: That is all.

Examiner Wrenn: Anything further?

Mr. Reilly: Yes.

Q. (By Mr. Reilly): Does the Air Line Pilots Association have to approve this agreement between W.A.L. pilots and U.A.L. pilots?

A. No.

Q. Suppose we just took you, and nobody else, would that settle the matter? And I am not being facetious. Would you answer my question.

A. No.

Mr. Reilly: O. K.

Examiner Wrenn: Let's recess until tomorrow morning at 10 o'clock in this room.

(Thereupon, at 5:25 p.m., the hearing was adjourned until Tuesday, November 15, 1949, at 10 a.m.) [2200]

Examiner Wrenn: All right, gentlemen, may I have your attention.

Captain Stephenson, you may resume the stand. Whereupon,

A. W. STEPHENSON

resumed the witness stand, and was examined and testified as follows:

Examiner Wrenn: Before Mr. Bennett takes his redirect, are there any further questions of this witness on cross-examination?

Mr. Renda: I have none, Mr. Examiner.

Mr. Reilly: I have none, Mr. Examiner.

Examiner Wrenn: All right, Mr. Bennett.

(Testimony of A. W. Stephenson.)

Redirect Examination

By Mr. Bennett:

Q. Mr. Stephenson, in answer to a question by Mr. Renda, you indicated your earnings for 1946 were \$11,383.13. A. Yes.

Q. Do those earnings reflect a comparable earnings for flying DC-4's on Route 68 for that year?

A. No.

Q. Will you tell us how that earning was acquired during 1946?

A. From April 26 to December 31 that was DC-4—that was for flying DC-4's on Route 68. From January 1 to March 26 that was for flying DC-3's on Route 19. And there was no flight pay paid me from March 26 to April 26.

Mr. Renda: What year? [2205]

The Witness: 1946. There was base pay but no——

Q. (By Mr. Bennett): No what?

A. No flight pay. That is to say, it wasn't paid me during that time. I might have received pay during that period for previous flight periods.

For instance, on the 20th of April I received my pay for March flight time.

Q. What were you doing during the month of April?

A. Flying—qualifying on Route 68, and the equipment.

Q. And that took a month?

A. Exactly from the 26th of March to the 26th of April.

(Testimony of A. W. Stephenson.)

Q. Now, in the pay for flying DC-3's, that is something less than pay for flying DC-4's; is that right? A. That is right.

Q. Now, in 1947, you indicated, in answer to a question by Mr. Renda, that your pay for 1947 was \$12,382.22. Does that figure—is that a comparable figure for a flight of DC-4's over Route 68 for that year 1947? A. No.

Q. Well, will you explain what equipment you were flying during that year and why it is not a comparable pay?

A. I was flying DC-4's on Route 68 until the 15th of September, 1947, and then went into DC-4's on Route 63.

Q. Now, after the 15th of September a portion of your time was taken up in qualifying on the new route; is that right? [2206]

A. That is right.

Q. And I think that worked out something like five days of actual flight time——

A. About seven days.

Q. Did the pay you received for the balance of the year 1947 in your flying of DC-4 planes over Route 63 equal the pay that you would have received on Route 68 flying DC-4's? A. No.

Q. Why?

A. Because of the difference in the amount of night flying time that was available to myself and the other senior pilots.

Q. And I believe you testified yesterday that

(Testimony of A. W. Stephenson.)

the difference was something in the neighborhood of \$150 a month; is that right?

A. That is right.

Q. Now, you testified yesterday, in answer to another question from Mr. Renda, that your 1948 pay was \$12,517.45.

A. That is right.

Q. Does that figure reflect the figure that would have been earned on DC-4 planes on Route 68?

A. No.

Q. Will you tell us why it does not?

A. Because the scheduling—the adjustment and scheduling did not, until about May of that year, adjust itself back with a complete cycle of part of a summer and a winter's experience on the thing, reverting back to the system we had, and was easily usable on Route 68 to the senior captains [2207] flying night runs.

Q. You mean during a part of—until May, 1948, you didn't get a comparable amount of night flying; is that it?

A. That is right.

Q. Now, Captain, in answer to a question by Mr. Reilly you indicated that you were familiar with the contemplated sale of a small portion of Western's route to Arizona Air Lines; is that true?

A. That is true.

Q. Do you know how much time was involved in the flying on that line that was contemplated being sold?

A. It was approximately an hour a day, as I remember it.

Q. And the pilot flies 85 hours a month; I mean,

(Testimony of A. W. Stephenson.)

that would be one pilot's work; is that right?

A. That is right.

Q. Was the time you remember equal to one pilot?
A. No.

Q. I am not certain about this, but I think you answered that there were two pilots involved. Did you make such an answer?

A. I did. What I meant by that was that there were two pilots who normally flew the route, and that they were the individuals involved and concerned about what would happen to them when the route was sold.

Q. But the time involved was only one pilot's time?

A. That is right. They flew other routes. They did not fly just Yuma. They flew the circuit.

Q. Yes. Now, I believe in answer to a question of [2208] Public Counsel he asked you whether or not if Western's pilots were required to be taken into United's list, if that wouldn't result in the furloughing of United pilots. Do you remember that question?
A. I do.

Q. And what was your answer at that time.

A. My answer was that that was something that would occur.

Q. Would you enlarge upon that? Would that have occurred, in your opinion, in 1947 when this route was exchanged, or when the route was sold?

A. No, not in any way involving the sale of Route, because——

Mr. Reilly: Mr. Examiner, I am going to object

(Testimony of A. W. Stephenson.)

to this unless he has a foundation as to how Captain Stephenson knows anything about what would happen on United Air Lines.

Examiner Wrenn: That is a proper objection.

Q. (By Mr. Bennett): Do you know that pilots would be furloughed at the bottom of United's list if Western pilots were taken into United?

A. No.

Mr. Reilly: I object to that question.

Mr. Bennett: If you know.

Examiner Wrenn: Read me the question. I thought he asked "Do you know."

(The question and answer were read.)

Examiner Wrenn: Perhaps you could explain that answer. Captain Stephenson. [2209]

Mr. Reilly: Does he mean No, he doesn't know, or does he mean no, they wouldn't be furloughed. That is what I want to know.

The Witness: I mean that I don't know.

Examiner Wrenn: All right. That clears it up. Go ahead.

Mr. Bennett: That is all.

Examiner Wrenn: I want to be sure I understood you on one thing, Captain. The question I asked you yesterday afternoon. I believe you said that the question of merging of seniority lists in the event the Board should impose as a condition that which the air line pilots seek here, had been settled.

The Witness: It has been agreed upon by the

(Testimony of A. W. Stephenson.)

two groups of pilots that they will settle that between themselves by arbitration.

Examiner Wrenn: Was that an arrangement between the pilots of United and the pilots of Western, or was that done by the Air Line Pilots Association?

The Witness: No, sir; that was done between the two groups of pilots.

Examiner Wrenn: Well, would you give me a little bit more of the procedure, or what was done? Was a meeting called for that purpose, or how did you happen to enter into the arrangement?

The Witness: That is right, sir. We were called together by the Air Line Pilots Association and told that they thought we should resolve our difficulties and agree upon a plan to settle it. [2210]

Examiner Wrenn: And you did agree upon a plan?

The Witness: We did.

Examiner Wrenn: And there is no question as far as this Board is concerned with respect to any seniority problems?

The Witness: No, sir. We are bound—have committed ourselves to arbitration, and to agree to those points.

Mr. Bennett: And I take it it is your intention, Mr. Stephenson, to inform the Board of the outcome of that arbitration?

The Witness: That is right.

Mr. Bennett: And to recommend in accordance with it the number and the identity of the pilots,

(Testimony of A. W. Stephenson.)

who the two groups recommend should be transferred?

The Witness: That is right. And their recommended positions on the seniority lists.

Examiner Wrenn: Both groups are committed to accept the decision of the one who is called upon to arbitrate?

The Witness: We are, sir.

Examiner Wrenn: I would like to ask you one other question on a different line, Captain.

As I recall Mr. Drinkwater's testimony in the first hearing, he stated that there were 14 crews on Route 68, and it is my recollection that he said that that number—at least that number, and maybe more, would be required to operate the Seattle extension.

I hope I haven't done violence to his testimony.

What I want to know is, do you know of your own knowledge whether or not those 14 crews on Route 68 were [2211] transferred over and began to operate on Route 63, particularly the extension?

The Witness: They were transferred to Route 63, but in so doing they displaced crews that were already operating Route 63.

Examiner Wrenn: What I am trying to get at is the number of crew men that would be required to operate the extension that was granted—the Seattle extension.

The Witness: Normally, sir, the difference in that is about 39 hours of flying per day on Route 63, the extension from San Francisco to Seattle—

(Testimony of A. W. Stephenson.)

no, I will correct that. On Route 68, 39 hours as a round number. That is the daily work load. And on the 63 extension the normal work load has been about 22½ hours, so that is roughly half of the normal number of crews on 68, or approximately half who are required to operate the extension.

Examiner Wrenn: That is about seven crews?

The Witness: That is right, sir. It would take a fine calculation as to the number of hours, and so forth, because after all we are governed closely and regulated closely as to the number of hours we can fly, and how we can accomplish that without going over the 85 hours.

Examiner Wrenn: Is it your testimony that as a result of the Seattle extension only seven crews are needed so the result was a net loss of seven crews to the Western system?

The Witness: That is right, sir. However, the Western pilots have never, if I may explain to you——

Examiner Wrenn: Sure. Go ahead.

The Witness: ——have never been in accord with that [2212] line of thinking. For this reason: That Seattle, the application of Western to operate to Seattle was history. The decision, everything, had been put into that months before, and we were waiting day by day, and we were primed and set ready to fly it. And we felt that because before the Board ever started formally contemplating giving this transfer, that they issued an order authorizing Western to fly Route 63. That, of course, is one

(Testimony of A. W. Stephenson.)

of the things that both United and Western's pilots realized, and one of the things we realized we must discuss and consider, and we expected to do that.

What I am getting at is, that a Western pilot flying for Western in 1947 felt that the Western extension was something that we were entitled to, were looking for the Board to give it to us. We were looking forward to it.

Do you get what I mean?

Examiner Wrenn: I understand your position on it.

The Witness: However, time has been lapsing since then. A lot of things have happened and occurred to change that situation. Western pilots appreciate that, and we have gotten together and said we propose to settle and make a binding settlement that will bring us in accord.

Examiner Wrenn: Mr. Renda, do you have anything further of the witness?

Mr. Renda: I have.

Recross-Examination

By Mr. Renda:

Q. You say that the pilots were primed and set ready to fly Seattle long before the Board certified Western to [2213] Portland-Seattle?

A. That is right.

Q. Now, the Board's decision awarding extension of Western's Route 63 to Portland and Seattle was prior to the commencement of the proceeding in the Route 68 case?

A. That is right.

(Testimony of A. W. Stephenson.)

Q. And did any pilots at any time prior to that time, the time I have in mind is May 20, 1947, qualify on Route 63 north to San Francisco?

A. No.

Q. Was any training undertaken?

A. We trained on equipment, yes.

Q. Well, you were trained to fly DC-4's because they were flying between Los Angeles and San Francisco, and that is the equipment that was used on that route?

A. No, not altogether. We had 52 crews trained to fly DC-4's at that time.

Q. Is it your testimony that Western Air Lines undertook a program to operate the route north of San Francisco to Seattle prior to the Board's decision?

A. They undertook a program to train flight crews on DC-4 equipment so they would have sufficient crews to operate Route 63.

Q. Route 63 to where?

A. From San Francisco to Seattle, and also operate six round trips to Denver.

Q. That is just your opinion?

A. Well, I know what the plan was. I know that we had 52 crews. [2214]

Q. Did you qualify on the route north of San Francisco to Seattle before the Board's decision?

A. I didn't say——

Q. Answer my question, please.

A. I did not.

Q. At the time that Mr. Drinkwater testified on the Route 68 case on May 20, 1947, and there was

(Testimony of A. W. Stephenson.)

mention of 14 flight crews, 14 flight crews is the number mentioned at that time to operate four round-trips; is that correct?

A. That is what he stated was the number.

Q. Well, now, didn't you testify yesterday that it takes three and a half crews to fly one round-trip between Denver and Los Angeles?

A. I testified to that, yes.

Q. And isn't three and a half times four fourteen? A. A——

Q. You can answer that.

A. That is right.

Q. Now, let us turn to September, 1947, at the time the route was transferred. How many round-trips were being operated? Two, is that correct?

A. That is right.

Q. And two times three and a half is seven flight crews? A. That is right.

Q. Hasn't it been necessary to absorb more than seven flight crews between San Francisco and Portland and Seattle?

Examiner Wrenn: Read that question back, please.

(The question was read.) [2215]

Examiner Wrenn: I don't follow you there, Mr. Renda. Maybe the witness does.

Q. (By Mr. Renda): In the operation north of San Francisco to Portland and Seattle with the three schedules Western put into service starting August, 1947, didn't it require more than seven flight crews to operate that extension?

(Testimony of A. W. Stephenson.)

A. About seven flight crews. That is an approximate figure.

Q. All right. And weren't the other seven flight crews from Route 68 absorbed elsewhere on Western's system?

A. The actual crews from 68, most of them, yes; not all of them. Some of them are on this list here.

Examiner Wrenn: Let me clear up one thing. Where did those seven flight crews come from that you and Mr. Renda have been discussing?

The Witness: Well, originally, and incidentally we were talking about 14 flight crews that I testified was the absolute minimum of men that could fly Route 68 with no time off—everyone flying 85 hours per month to operate that route.

Now, when——

Examiner Wrenn: Let's be clear. I don't want you to explain Mr. Drinkwater's testimony. When Western comes along with their case I expect them to clear that up. I just want to know if you have any knowledge on that 14 flight crews Mr. Drinkwater testified about.

Now, these seven you were talking about, were they taken off of Route 68 as of August 1, 1947, or were they hired elsewhere in that program you were talking about? [2216]

The Witness: They were taken off Route 68 on August 1, the original ones.

Examiner Wrenn: And when the route was transferred, what happened to the other crews?

(Testimony of A. W. Stephenson.)

The Witness: The other seven senior to them moved on Route 63 and used their seniority to reduce.

Examiner Wrenn: So the 14 crews actually moved over to Route 63, after you began to operate the extension to Seattle?

The Witness: The minimum number of 14 crews, sir.

Examiner Wrenn: Go ahead, Mr. Renda.

Q. (By Mr. Renda): Do you question the fact that in 1946, 1947, and 1948 you earned the amounts that we have been mentioning—\$11,000, \$12,000, and so forth?

A. I question—raise a question as to whether I was earning or that was what I was paid. Because the pay roll department does not report to the Government our earnings for the year, but what we are paid for the year. And that means December—in January, 1948, shows what I—I get my flight paycheck for December, 1947. That is what I mean.

Q. Well, now, certainly there can be no doubt in your mind as to whether or not you earned and were paid this money or you were not, is there?

A. There is no doubt in my mind I was paid that amount of money.

Q. Very well. What type of equipment were you flying in April, 1948? A. 1948? [2217]

Q. Yes. A. Convairs principally.

Q. Practically all Convairs?

A. I believe so.

(Testimony of A. W. Stephenson.)

Q. Do you know what you earned in 1948, in April?

A. I don't have that figure with me.

Q. Our records show you earned \$1,114.91. What were you flying in April, 1947? A. DC-4's.

Q. On Route 68? A. That is right.

Q. Do you know what you earned in April, 1947? A. No.

Q. Our records show \$1,118.25.

A. Do your records show that is what I earned or what I was paid?

Q. That is what you earned. You were finally paid that amount.

A. Do your records show that—when I earned that?

Q. Our records show that you were paid that on the basis of the retroactive adjustment.

A. I was inquiring whether that was what I earned or what I was paid in money that month.

Q. Do you remember what type of equipment you were flying in April, 1948—Convair, wasn't it?

A. We mentioned that once, yes.

Q. Yes. All right, how about March? That was Convair, too, wasn't it? Do you remember what your earnings were in March, 1948? [2218] \$1,178.31?

Mr. Bennett: May I inquire the purpose of this? If it is important to this record, I don't want to stop him, but I don't see any—

Mr. Renda: I think the purpose is very obvious. Mr. Examiner.

(Testimony of A. W. Stephenson.)

Mr. Bennett: Well, I would like to see. It isn't me.

Mr. Renda: It is to the Examiner.

Examiner Wrenn: I think I see the purpose of it. Continue.

Q. (By Mr. Renda): In March, 1947, you were flying DC-4 equipment? A. Yes.

Q. Do you question that you earned \$1,129.74?

A. No. That is probably right.

Mr. Renda: No further questions.

Examiner Wrenn: Without arguing about particular questions, you raised the point there of what you earned and what you were paid. Perhaps you keep some pay in the hole, or something like that, but what Mr. Renda is bringing out is that your earnings have been practically the same whether you flew DC-4 or Convair airplanes.

The Witness: There is not much difference in the two airplanes.

Examiner Wrenn: Well, there was a question by you as to whether there were some earnings in March that was carried over to April, or in April carried over to May.

The Witness: Well, that doesn't affect the amount where a full month of flying is concerned, the amount of pay. But what I would like to explain to the Examiner is that the [2219] \$11,000 figure in 1946 is no—there is four months that was in there where there was no DC-4 flying in it, and one month there was no flight pay at all.

(Testimony of A. W. Stephenson.)

Examiner Wrenn: I think we are clear on the record on that, Captain.

Anything else before I excuse the Captain?

Mr. Reilly: I have some questions, if I may, please, sir.

Examiner Wrenn: All right.

Q. (By Mr. Reilly): Going back to Yuma-Phoenix, as I understood your testimony in answer to both direct and redirect, and everything we have had here, you were interested in the principle that was involved in this proceeding. The transfer of pilots with the route.

Now, as I understand your testimony, and your answers to Mr. Bennett on redirect—and you can correct me—you are not interested if only one pilot is involved, or only 29 flying hours a month are involved?

A. We are interested if one pilot is involved.

Q. How are you going to spilt this pilot up on Yuma-Phoenix?

A. I didn't finish my answer.

Examiner Wrenn: Go ahead.

The Witness: When it comes down to a problem of that kind where there is only 30 hours, or so, I agree with you, you can't split a pilot.

Q. (By Mr. Reilly): Isn't the real answer, Captain, that a senior pilot [2220] is not involved in this case?

A. That is certainly not the real answer.

Q. Now, tell me a little bit about this experience you had at National Parks. What was your posi-

(Testimony of A. W. Stephenson.)

tion up there before it was sold, or transferred to Western Air Express?

A. Vice-president in charge of operations.

Q. What did you become in the new company?

A. Division superintendent.

Q. How long did you stay in that position?

A. Until April, 1939.

Q. What happened?

A. I went back to flying.

Q. Why?

A. We started a reduction campaign in costs and overhead.

Q. Well, that isn't any different, is it, Captain Stephenson, from what Mr. Drinkwater has said he has been trying to do in Western Air Lines today, and tried to do in 1947, is it?

A. Not particularly, no.

Q. I don't want you to interpret his testimony. I am just asking you about his statement.

Now, when was the last time you had anything to do with the assignment of crews? Was it when you were division superintendent of Western Air Express, or vice-president of National Parks Airways?

A. With Western Air Express.

Q. And that was in 1939. What kind of equipment? Boeings? [2221]

A. That is right.

Q. What—247's?

A. That is right.

Q. Have you ever had any experience in the assignment of crews, for DC-4's or Convairs?

A. Yes.

Q. You have? In what capacity?

(Testimony of A. W. Stephenson.)

A. Air base commander in the Army.

Q. Now, that is very interesting. On a commercial air line. That is very interesting. I am glad to know you were in the Army.

But how about on a commercially scheduled air line? A. In assigning——

Q. Assigning crews and setting up schedules. You have made a lot of testimony——

Mr. Bennett: I don't think you should argue with the witness. Ask a question and you will——

Mr. Reilly: This is cross-examination.

Mr. Bennett: That still doesn't permit you to harass the witness.

Examiner Wrenn: Will you gentlemen both be quiet, please?

Go ahead.

Q. (By Mr. Reilly): Can you answer my question—when was the last time, if ever, you have assigned schedules or set up crews on a DC-Convair equipment, or DC-3 equipment, on a scheduled commercial air line? A. I never have. [2222]

Q. All right.

Now, let's talk a little bit about these resolutions adopted by the Air Line Pilots Association's Executive Board. Did you ever at any time—let me first say this: Have you got all your records here? Have you got copies of all resolutions passed and adopted by the Executive Board with respect to this transaction? A. I have not.

Q. Let me see if I can refresh your recollection. Did you ever at any time state that the following

(Testimony of A. W. Stephenson.)

resolution was adopted by the Executive Board of the A.L.P.A. in connection with this transaction:

“Therefore, be it resolved that the sale of the W.A.L. Denver-Los Angeles route to U.A.L. should be treated as a sale of a portion of an air line to another and be governed in principle by the resolution pertaining to such, passed by the first and second Executive Board meetings;

“Be it further resolved that the number of pilots involved in the transaction in our opinion should be 21;

“Be it further resolved that the identity of the 21 pilots to be determined by W.A.L. pilots, but they must be pilots who were actually flying that route at the time the sale was made public or pilots junior to them.”

Examiner Wrenn: Read the first part of that question, Mr. Reporter, the part before the quotation.

(The record was read.) [2223]

The Witness: May I ask, is the question: Did I state this to the Board?

Examiner Wrenn: Do you want to hear the question again?

The Witness: Yes.

Mr. Reilly: To anybody.

The Witness: Yes, I stated this resolution to the Civil Aeronautics Board in an informal session.

Q. (By Mr. Reilly): It was December 5, 1947, for the record? A. That is right.

(Testimony of A. W. Stephenson.)

Examiner Wrenn: Now, what is the state of the record on that answer there?

(The answer was read.)

Q. (By Mr. Reilly): Can you tell me when that resolution was adopted by the Executive Board of the A.L.P.A.?

A. The second executive board meeting in November of 1947.

Q. Now, let me show you this document. This is a document entitled, "Petition by the Air Line Pilots Association for Reconsideration of the Order of August 26, 1947," and it is dated on the front page September 23, 1947.

On the Jurat page, which is page 16, Mr. Behncke certified and verified to this document 23 September, 1947, and I assumed it was filed with the Civil Aeronautics Board as promptly thereafter as it could be handled through the mails or by hand.

And I show you on page 7 what purports to be a resolution, and quoting from this: [2224]

"So far as United and Western pilots are concerned, the following resolution passed by the Executive Board of the Air Line Pilots Association at its last meeting on May 24, 1947, is quoted."

I will read the resolution:

"Resolved, that in the event of a merger, acquisition, dissolution, or any other form of the acquiring of one air line by another air line, or a part thereof, that the air line pilots

(Testimony of A. W. Stephenson.)

flying on such air lines or portions thereof at the time such event occurs are considered as being acquired with the air line or portion thereof and their respective accrued seniority rights remain as their possession and continue to accrue as their possession after such ownership, and moreover that such pilots and copilots flying on that air line at that time cannot be dealt with unfairly and their continued employment with the purchasing company endangered or prejudiced in any manner. The number of pilots affected in such event should in no case be larger or smaller than the normal number of pilots used in that operation at the time this event is approved by the Civil Aeronautics Board."

Now, can you tell me why the difference in the two resolutions?

Mr. Bennett: If you know—I think you should add.

Mr. Reilly: Well, you have added it for him. I think you are doing very well. [2225]

Examiner Wrenn: Go ahead.

I think you should address your remarks to the Examiner and not to each other.

The Witness: The difference in the resolutions is the resolution of the first Executive Board meeting in May, 1947, and this resolution was the combined opinion of the second Executive Board meeting in November.

Q. (By Mr. Reilly): In other words, this resolution says nothing about the number of pilots; is

(Testimony of A. W. Stephenson.)

that right? A. That is right.

Examiner Wrenn: Let us identify those.

Q. (By Mr. Reilly): The May 24, 1947, resolution does not say anything about the number of pilots involved—number of Western pilots involved; is that correct? A. That is right.

Q. Now, the November, 1947—I think that meeting was held November 20, if I may not be mistaken—the November 20, 1947, resolution speaks of 21 pilots. A. That is right.

Q. Were there 21 pilots flying Route 68 for Western Air Lines on March 6, 1947?

A. No, it was the minimum normal operation there with actually 46.

Q. Flying?

A. Flying that route that month.

Q. All right. On May 20, 22, 1947, how many pilots were flying the route? [2226]

A. It was down to the—it was the same operation——

Q. Just give me numbers, if you will, Captain.
Mr. Bennett: If you know.

The Witness: I don't know.

Q. (By Mr. Reilly): You have been talking about the number involved since you have been on the stand, both as to men and as to crew members.

Mr. Bennett: I still don't think he should argue with the witness.

Examiner Wrenn: We have got an answer. Go ahead.

Q. (By Mr. Reilly): How many crew members were flying the route on August 25, 1947?

(Testimony of A. W. Stephenson.)

A. I don't know.

Q. And your position today, or since this hearing started, is that you are arbitrating with United Air Line pilots with respect to the number of crew members and seniority? A. That is right.

Q. When did these negotiations start?

A. About a week ago.

Q. And with whom?

A. With United's pilot representatives.

Q. Was Mr. Fallon in that group? A. Yes.

Q. And Mr. McBain? A. Yes.

Q. And who else? [2227]

A. Mr. Brady and Mr. Gillespie.

Q. R. W. Brady? A. That is right.

Q. Has there ever been any time the United pilots indicated to you that they were opposed to the absorption of any Western pilots by United?

Mr. Bennett: May I have the question?

Examiner Wrenn: Read the question.

(The question was read.)

Examiner Wrenn: That is your own personal knowledge, Captain. To you, personally?

Mr. Reilly: That is right.

The Witness: No.

Q. (By Mr. Reilly): Did you ever discuss this matter with a pilot of United named Captain Joe L. Crouch? A. Many times.

Q. He never at any time indicated to you that United's pilots were opposed to the taking into United of any Western pilots? A. No.

Q. Do you know a captain by the name of Captain L. L. Jones of United Air Lines?

(Testimony of A. W. Stephenson.)

A. I do.

Q. Did you ever discuss with him this proceeding, and, if so, did he ever indicate to you that the United pilots were opposed to absorption of any pilots by United?

A. I never discussed it with Mr. Jones.

Q. And Mr. Crouch never indicated? [2228]

Mr. Bennett: Well, I think he should finish the question.

Indicated what?

Examiner Wrenn: Well, I think it is clear on the record.

Do you have any answer to that, Captain, or not?

The Witness: I answered it once.

Mr. Reilly: He answered it once. The Captain knows the answer.

Examiner Wrenn: All right. Proceed.

Q. (By Mr. Reilly): Under what authority have you commenced arbitration with United's pilots? Is there something in the A.L.P.A. that gives you fellows the authority to do that? Is there anything in your contract with Western, or if you know, with respect to United's contract with the pilots that permits you to do this?

A. Well, I don't quite get that question.

Q. I will restate it: Is there anything in your contract with Western that precludes you from entering into an arbitration such as you say you have entered into with United's pilots? A. No.

Q. And are you free to tell us whether or not

(Testimony of A. W. Stephenson.)

the negotiations are completed and you have come to an agreement?

A. The negotiations are not completed.

Q. Have you completed negotiations with respect to seniority?

A. They are not complete, no. [2229]

Q. That is one thing you are discussing?

A. We are doing.

Q. And can you tell us the number of pilots that is going to be suggested that United should absorb?

A. No.

Q. Has anybody from—Has Mr. Fallon or Mr. Brady or Mr. Gillespie or Mr. McBain at any time to you indicated that they had any authority, direct or indirect, or permission from management of United Air Lines to discuss this matter with you?

Mr. Bennett: Do you understand the question? If you don't, have it read.

The Witness: Will you read it?

Examiner Wrenn: Read the question.

(The question was read.)

The Witness: No, because it has never occurred to either group that under our existing contract in any way the United Air Lines or Western Air Lines had any authority to—had assumed any authority to tell us what we could and what we could not do with respect to this matter, in our own Association.

Q. (By Mr. Reilly): That is right.

Now, you have stated a number of times that after you complete this arbitration, or whatever

(Testimony of A. W. Stephenson.)

name you wish to call it, you are going to present it to the Civil Aeronautics Board and recommend that that is the way this matter be disposed of.

Have you ever given any thought to whether or not the [2230] management of United Air Lines might be contacted or communicated with with respect to the proposal that might be submitted to the Board?

A. Our thought is that we make the recommendation to the Board.

Q. In other words, you have no thought whatsoever in the interest of solving the matter, let us say, amicably, if it could be, or any other way? You are going to present it right to the Board, and our pilots have agreed with you? A. That is right.

Q. Now, in the event that United Air Lines, in the event that the Board directs United Air Lines to accept the results of your arbitration, and United says that they will not accept the condition, what will be the position of the Western pilots?

A. I don't know.

Q. Has that matter been discussed between the pilots of United and the pilots of Western Air Lines?

A. No, because we have assumed that the Board reopened this case to determine this matter and complete it, and we are prepared to do our part in helping them to arrive at a solution, and that is what we propose to do—to do everything we can to——

Q. That is right. A. ——to do so.

Q. All right, in light of that, will you answer

(Testimony of A. W. Stephenson.)

me this question: When did you first have knowledge or information that United Air Lines was to commence operations over the transferred route on September 15, 1947? [2231]

A. A day or so after the order was issued.

Q. It was made public—the date of the order was August 25, and it was made public August 26?

A. That is right.

Q. What did you do after the order with respect to reopening the proceeding in the light of no condition being contained in the order?

A. I went home and thought it over.

Q. And then after you thought it over, what did you do? A. I——

Q. What was your title on the Executive Council of W.A.L. at that time, Captain?

A. I had been delegated to represent Western pilots in this matter.

Q. You were not either master or assistant master?

A. No, I was not. I was acting as assistant to the master on this matter.

Q. You were delegated to assist in this matter?

A. That is right.

Q. After you thought it over what did you do and when did you do it?

A. I immediately consulted with as many of our own pilots as it was possible to get together and discuss it.

Q. Did you come to any conclusions?

A. Yes.

(Testimony of A. W. Stephenson.)

Q. What were those conclusions, or conclusion?

A. We came to the conclusion that we should ask A.L.P.A. headquarters to ask for a [2232] reconsideration.

Q. Was that on or before the bulletin board notice of September 4, with respect to dismissals or furloughs?

A. It was going on at the same time.

Q. That is very important that you try to tell me for the purposes of this examination whether it was before or after.

A. Well, the dates set that. We started to work on that on the 26th or 27th. This bulletin board notice didn't come out until the 4th.

Q. And at all times you were aware that United proposed to commence operations September 15; is that correct?

A. After the announcement came out.

Examiner Wrenn: We still don't have the answer to that question, though, Captain, as to whether or not you and the Western pilots decided to ask the A.L.P.A. headquarters to do something in this before the September 4 letter was put on the bulletin board, or not.

The Witness: We did before.

Q. (By Mr. Reilly): Before September 4?

A. Yes.

Q. Can you tell me, then, in light of that knowledge, before September 4, and also in light of the fact that you knew that United proposed to begin operations on September 15, and that the contract

(Testimony of A. W. Stephenson.)

provided that the properties would be transferred at that time, why is it that the A.L.P.A. delayed the filing of the petition for reconsideration to September 23?

A. Because it took a great deal of time and work to [2233] prepare the petition.

I might inform you that the petition—I did a considerable part of it, worked consistently on it for a good many days.

Q. Well, let me ask you about that now. That is interesting.

Tell me what it is that took all the time that you had to be eight days after you knew the operation was going to commence?

Let us go over this petition. Now, what is it that took so much time——

A. Please be careful of my glasses.

Q. I am sorry.

Examiner Wrenn: Who signed the petition?

Mr. Reilly: It is signed by Mr. Behncke.

Mr. Bennett: Are you asking——

Mr. Reilly: He said he did a lot of work on the petition. I am asking him about it.

Mr. Bennett: We heard him——

Examiner Wrenn: Will you gentlemen please refrain for a minute.

I am perfectly willing to have Captain Stephenson testify as to his own part in this thing, but whatever involves Mr. Behncke that is something else.

(Testimony of A. W. Stephenson.)

Mr. Reilly: Why don't I ask the captain to show me what he did on this.

Examiner Wrenn: All right.

The Witness: I helped him prepare, and discussed the form and wording of the entire text of it. [2234]

Q. (By Mr. Reilly): Let me ask you about this. This part here is the decision. That didn't require any work.

Examiner Wrenn: What page is that?

Mr. Reilly: Page 1.

Examiner Wrenn: All right.

Q. (By Mr. Reilly): This is the September 4 letter. You didn't have to do any work on that, did you? That is just a copying job? A. No.

Q. This is testimony out of the record also, isn't it? A. Yes.

Q. That is a continuation of the testimony; is that correct? A. That is right.

Examiner Wrenn: Let's clear it up and get it this way.

Captain, did you prepare a draft of that or a preliminary draft?

The Witness: In the first place, I had to go to Chicago to do it. I had to take someone with me. I had to make a study of the whole thing and try to get as accurate and as intelligent a picture of the whole situation as we saw it into the petition.

Mr. Reilly: Well, the record and the petition are all a part of the record. I won't labor the record any more with it. The Board and the Examiner are familiar with what is in it.

(Testimony of A. W. Stephenson.)

Q. (By Mr. Reilly): Have you any idea, Captain, when your arbitration [2235] with Messrs. Fallon, et al., may be completed?

Mr. Bennett: Just a minute. I don't think the record has indicated that the arbitration is going to be with Mr. Fallon.

Q. (By Mr. Reilly): The board of which Mr. Fallon is chairman, Captain Stephenson?

A. Yes.

Q. When? A. Within 30 days at the most.

Q. It won't be completed before this hearing is ended? A. No.

Q. Do you plan to submit it after the hearing?

A. That is right.

Mr. Reilly: Mr. Examiner, in view of the testimony yesterday and today of Captain Stephenson, I ask that the Examiner direct the Air Line Pilots Association to furnish the minutes of the meetings which resulted in the adoption of the resolution of May 24, 1947, and the minutes of the meeting of the Executive Board of the Air Line Pilots Association, which resulted in the adoption of the resolution set forth in the petition, and I believe the date of adoption was November 20, 1947.

Examiner Wrenn: Is there any objection to furnishing that information, Mr. Bennett?

Mr. Bennett: I can tell you now I can't furnish it. But I would like to know what purpose would be served if I could furnish it.

Examiner Wrenn: Then why argue about [2236] it?

(Testimony of A. W. Stephenson.)

Mr. Reilly: I would be happy to state that on the record.

Mr. Bennett: If you would be happy, I would like to hear it.

Examiner Wrenn: Just a minute.

Mr. Reilly: There has been considerable testimony that the United and Western pilots are now in approximate agreement. I use the word "approximate" advisedly.

The Council of United Air Lines' pilots intervened on the basis of their—a copy wasn't served on me, but from reading it I understood their position was different from that of Western—otherwise there would be no point in their intervention, because their position could be represented by counsel for A.L.P.A.

Now, we have reason to believe that from the start of this transaction the pilots of United Air Lines, including Mr. R. W. Brady, whose name was mentioned here, were strenuously objecting to the absorption, and I don't want to start over again with the September meeting, but I want this record to show at what time, if any, the pilots of Council 57 have ever changed their minds, and to what extent.

And I think the minutes of those meetings would show—and I have information to believe that the proceedings of those meetings are transcribed, and that they can furnish us such transcriptions of the position taken by United's pilots.

Mr. Bennett: Are you speaking now of the

(Testimony of A. W. Stephenson.)

meetings from which these two resolutions that you have read into the record came?

Mr. Reilly: The full proceedings, the transcripts of [2237] those meetings.

Mr. Bennett: I don't even know that there are transcripts. I question whether there are. But I am not in a position to furnish them in any event. The resolutions are in the record, and whatever the resolutions state——

Examiner Wrenn: What do you mean, you are not in a position to furnish them?

Mr. Bennett: I don't know whether we have them, or not, and I couldn't certainly agree to furnish them.

Mr. Kennedy: Mr. Examiner, I think if they are available they ought to be furnished.

Mr. Reilly: Mr. Examiner, if you don't direct them, we may ask for a subpoena. But we have made up our minds to subpoena for other information.

Mr. Bennett: That is a different matter. If he subpoenas us, and we have to produce them, if we have them I presume we will.

Mr. Reilly: You mean you won't honor a request of the Examiner?

Mr. Bennett: I am not in a position to answer the question.

Mr. Reilly: I want to state that we have information, and are led to believe that there are certain documents that are in existence, and if our pilots take the position either directly on the witness

(Testimony of A. W. Stephenson.)

stand, or—I mean the pilots of Council 57, that is, if Mr. Bennett is speaking for them, we are going to ask that they be placed under oath, and if they wish to disavow the statement of counsel that——

Examiner Wrenn: As long as Council 57 has intervened [2238] here and made representation that they had a substantial interest that would not be taken care of, and we permitted them to come in here, I had intended myself later in the proceeding to ask a few questions about that.

My only question is, can you get the information from those who are here, or is it necessary to go on and get the documents?

Mr. Reilly: They are here, and I would say that if they were put on the witness stand all I would ask is about the previous position—and we are certainly not taking the position that our pilots haven't the right to change their minds. But Captain Stephenson has said that Mr. Crouch, who is master of the Council, never took the position that the pilots of United had any opposition to the absorption of the Western pilots.

Examiner Wrenn: Let's be clear on that. I don't remember that Captain Stephenson stated that. I think your question at that time was, did Mr. Crouch ever say he was——

Mr. Reilly: No.

Examiner Wrenn: Then clear the record on it.

Q. (By Mr. Reilly): Did Mr. Crouch ever state to you that there was ever any opposition in

(Testimony of A. W. Stephenson.)

his Council to the absorption of Western pilots by United as a result of this transaction?

A. Captain Crouch never indicated to me any of the proceedings in meetings of his Council.

Q. Let me ask you this: At that December 5, meeting you talked about, did you state to me that that resolution was adopted over United Air Lines' opposition? [2239]

A. I may have.

Q. Did you attend the November meeting in Chicago, the Executive Board?

A. That is right.

Q. Did any United pilot—was Captain Brady there?

A. No—Captain Brady was there. He was not a member of the Board.

Q. Was Captain Crouch there? A. Yes.

Q. Did they, at any time, state any opposition to this resolution that was finally adopted?

A. Captain Brady did.

Q. Did Crouch indicate at that meeting that he didn't want any resolution to be adopted, to be an ironclad rule?

A. I don't understand a question of that kind.

Q. Well, I have asked you these questions before, haven't I?

Mr. Bennett: May I just for a moment?

Examiner Wrenn: Certainly.

Mr. Bennett: I don't see any purpose in the further examination of Captain Stephenson along this line. It has been indicated here—unless it will

(Testimony of A. W. Stephenson.)

serve some useful purpose here in the case, I am going to ask that it be stopped at this point.

It has been indicated in this record that the United pilots and the Western pilots, whatever the resolutions may have been passed, or whatever had been between these groups previously, that they are at this time in process of not only settling numbers, identities, and seniority, but that they [2240] would recommend then to the Board in accordance with that finding that comes out of an arbitration that they are now in process of conducting.

Now, what has gone on before in this matter as to resolutions, who objected, somebody objecting, anybody objecting, is, it seems to me, only confusing this entire issue, or this case. And if it is possible, as has been indicated, or if it is true, as has been indicated under oath, or in this hearing, that these two groups of pilots are now in complete accord—with this exception, that they are in arbitration, and that the answer to the arbitration will be final and binding upon both of them, then I see no purpose can be served in this character of examination.

If, as a matter of fact, they were still at odds——

Examiner Wrenn: I can't agree with you there, Mr. Bennett. If you had reached an agreement and brought it in here and we had it before us, there would be much more weight to what you say. But you haven't reached an agreement.

Mr. Bennett: I grant you that—yes, we have

(Testimony of A. W. Stephenson.)

reached an agreement that will entirely dispose of this matter.

Examiner Wrenn: We haven't seen it.

Mr. Reilly: He says he sees no difficulty with it. He may be right as far as the pilots are concerned, but United Air Lines certainly has an interest in this matter.

Mr. Bennett: Oh, no place in this record has anybody indicated that United Air Lines could possibly be bound by any arbitration proceeding between the pilots.

Mr. Reilly: They haven't said that, but they have expressed themselves that they are going to give it to the [2241] Board, give it to us with a meat ax.

Examiner Wrenn: I can't agree with you there, Mr. Bennett, because we don't have an agreement before us here between the pilots.

Mr. Reilly: Let me ask a question to clear it up.

Examiner Wrenn: All right.

Q. (By Mr. Reilly): If there has been no stated opposition by the pilots of Council 57, why is it, Captain Stephenson, that in almost three years which have elapsed since the signing of the contract—two years and eight months—that the pilots have been unable to agree and present a proposal either to the Civil Aeronautics Board or to the managements involved?

A. I—in answering you, you have assumed that there has been no stated opposition, which is to my way of thinking incorrect.

(Testimony of A. W. Stephenson.)

Q. Well, you tell me about that. I have been trying for half an hour to get you to tell me about that.

A. But as to who stated what to who, you have more knowledge than I have.

Q. Well, I certainly haven't as much involved. You are representing the Western pilots. Don't you talk to United's?

Examiner Wrenn: All right, now, ask him questions.

Q. (By Mr. Reilly): That is a question. Did you talk to United's pilots? A. Yes.

Q. Did you come to an agreement? [2242]

A. We have now.

Q. Did you at any time in the two years and eight months previous to today? A. No.

Q. How many times did you meet with them?

A. Not very many times.

Q. And is this agreement that you are close to negotiating, does this go for the transfer of all the pilots that have been riding the route?

Examiner Wrenn: Do you understand that question?

The Witness: No.

Q. (By Mr. Reilly): Does it comprise the 21 or 46 or 14 pilots you are talking about—

Mr. Bennett: If any.

Examiner Wrenn: Just a minute. If the Captain doesn't understand the question he can say so.

Mr. Bennett: Have him read the question.

(Testimony of A. W. Stephenson.)

Examiner Wrenn: Would you read the question, please?

(The question was read.)

The Witness: There is no agreement yet as to number.

Q. (By Mr. Reilly): Let me put it this way, Captain, if I may: Is the negotiations which are pending between Council 57 and your Council a compromise settlement?

A. No, it is an agreement to arbitration.

Q. Well, do you believe that you are going to stand on this resolution of 21 pilots adopted in November?

A. Before the arbitrator, perhaps. [2243]

Q. What is the question you are going to put to the arbitrator? If there is any grievance, why do you have it—or disagreement, why do you have an arbitrator?

A. We are having him to decide the number of pilots involved, their identities, who they are, and their recommended positions on the United seniority list.

Q. Well, there must be some disagreement, isn't there?

A. About what?

Q. Between you and Council 57.

A. Not any more. We have only one agreement, and that is to arbitration.

Q. You mean there is——

Examiner Wrenn: There is a variance in the answer.

Will you read the question and answer?

(The record was read.)

(Testimony of A. W. Stephenson.)

The Witness: Say it this way: We have an agreement which settles all disagreements.

Q. (By Mr. Reilly): Well, then, there must have been a disagreement?

A. There is a disagreement.

Q. Thank you very much, Captain.

A. For the reason that when Route 68 was transferred to United Air Lines, 28 to 31 Western Air Lines' pilots were reduced, and at that time 28 to 31 United Air Line captains received flights and flying pay, and obtained runs.

Q. This isn't responsive, but if you want to listen to it, it is all right with me.

A. It is part of my answer.

And time has elapsed since then and changed the situation [2244] considerably, and it is a matter now of determining what that sum should be. We don't want to ask United to take somebody that is no longer with Western.

For instance, as in one case——

Q. Well, Captain Hollenbeck wasn't with them since June some time away back in 1947. But you are still insisting upon 28 pilots.

Mr. Bennett: Is that a question or a statement?

Mr. Reilly: Just put a question mark after it and it is a question.

The Witness: Is it a question?

Examiner Wrenn: Yes.

Mr. Bennett: Can we have it read, please, so we may understand it if it is possible?

Examiner Wrenn: I think there has been enough of this needless by-play here back and forth.

(Testimony of A. W. Stephenson.)

Mr. Bennett: I am not in favor of it.

Examiner Wrenn: Well, just address your remarks to me, and I will direct Mr. Reilly to do the same thing, and I will make my rulings. And I don't need all of this outside help.

Read the question.

(The question was read.)

The Witness: I agree with the proposed position of Western Air Lines that shows a Captain Hollenbeck was still an employee of Western Air Lines until about the 6th of September, 1947, when he did not return from leave.

Is that right?

Q. (By Mr. Reilly): Well, whatever the date is it is in their rebuttal [2245] exhibit.

A. That is right.

Q. Will you explain for me how this arbitration proceeding was set up, and who set it up?

A. The representatives of the two groups, United Air Lines' and Western Air Lines' pilots, have agreed that they will arbitrate this matter. There will be two representatives on the Board who are active pilots from Western, and—or two pilots from Western and two pilots from United, and that the Mediation Board will provide the arbitrator, the fifth member.

Q. Out of their panel; is that right? The Mediation Panel? A. Yes. They will select a man.

Mr. Reilly: That is all I have.

Examined Wrenn: Do you have anything more, Mr. Bennett?



